This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

DS631.7.Q5
A

HARVARD
COLLEGE
LIBRARY

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

TRIAL

OF

ANDREW JOHNSON.

PRESIDENT OF THE UNITED STATES,

BEFORE THE SENATE OF THE UNITED STATES,

ON

IMPEACHMENT

BY THE HOUSE OF REPRESENTATIVES

FOR

HIGH CRIMES AND MISDEMEANORS.

PUBLISHED BY ORDER OF THE SENATE.

VOLUME II.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1868.

Digitized by Google

HARVARD UNIVERSITY

U.S. 6317.7(2)
A

IN THE SENATE OF THE UNITED STATES, *March* 23, 1868.

Resolved, That three hundred copies of the edition of the report of the impeachment trial published at the Congressional Printing Office be furnished, as the trial progresses, for the use of the Senate, and that five thousand copies of the entire work. with an index, be printed and bound for the use of the Senate.

APRIL 14, 1868.

Resolved, That there be printed for the use of the Senate, at the close of the pending impeachment trial, five thousand copies of the report thereof, in addition to the number of copies thereof heretofore ordered to be printed.

IN THE HOUSE OF REPRESENTATIVES, *March* 13, 1868.

Resolved, That the Congressional Printer be directed to furnish five copies of the trial of impeachment of the President of the United States, in book form, to each member of the House, the next morning after its publication in the Daily Globe, and to print and bind five thousand copies, when completed, for the members of the House.

NOTE BY THE EDITOR.—The phonographic report of the trial (from which the present volumes have been made up) was made for the Congressional Globe, by its Senate reporters, Messrs. Richard Sutton, D. F. Murphy, and James T. Murphy. The index was prepared by Mr. Fisher A. Foster.

It was necessary to print the work as the trial progressed, and the limited space left for the sketches of the introductory proceedings rendered it necessary to abridge them, and to publish the report of the debate on the right of Senator Wade to sit as a member of the court, in the appendix at the end of the third volume. This appendix also contains a few authorities in addition to those composing the brief prepared by Hon. William Lawrence, M. C. from Ohio, and presented by Mr. Manager Butler as a part of his opening argument, which have been furnished by the first-named gentleman.

B. P. P.

Digitized by Google

INDEX.

Digitized by Google

Digitized by Google

INDEX.

[The Roman numerals indicate the volumes.]

A.

Able, Barton. (See *Testimony.*)
Acquittal on Article XI ..... II—486, 487
II ..... II—496
III ..... II—497
judgment of, entered ..... II—498
Adjournment *sine die* ..... II—498
Admissibility of testimony. (See *Evidence.*)
Admissions to the floor, order (in Senate) that, during the trial, no person besides those who have the privilege of the floor, &c., shall be admitted except upon tickets issued by the Sergeant-at-arms—[*By Mr. Anthony:*] agreed to ..... I—10
Alta Vela letter ..... II—144, 262, 280, 306
remarks on, by—
Manager Butler ..... II—262, 267, 268, 281, 282, 284
Mr. Nelson ..... II—144, 265, 266, 267, 268, 280, 281, 282, 283, 284, 307
Manager Logan ..... II—268
Answer, application of counsel for forty days to prepare ..... I—19
discussed by—
Manager Bingham ..... I—20, 22
Mr. Curtis ..... I—20
Mr. Stanbery ..... I—21
Manager Wilson ..... I—20
denied ..... I—24
orders offered fixing day for respondent to file, by—
Mr. Edmunds ..... I—24, 35
Mr. Drake ..... I—35
Mr. Trumbull ..... I—35
order that respondent file, on or before 23d March—[*By Mr. Trumbull.*]
offered and agreed to ..... I—35
read and filed ..... I—37
exhibits accompanying—
A, message of President, March 2, 1867, returning with objections tenure-of-office bill ..... I—53
B, message of President, December 12, 1867, announcing suspension of Secretary Stanton ..... I—58
C, address to President, by Hon. Reverdy Johnson, August 18, 1866, communicating proceedings of National Union Convention ..... I—66
Anthony, Henry B., a senator from Rhode Island ..... I—11
orders by—
(in Senate,) that during the trial no persons besides those who have the privilege of the floor, &c., shall be admitted except upon tickets issued by the Sergeant-at-arms. Agreed to ..... I—10
that no senator shall speak more than once, nor to exceed fifteen minutes during deliberation on final question, except by leave of Senate, to be had without debate, as provided by Rule xxiii, offered ..... II—471
tabled, (yeas 28, nays 20) ..... II—474
that on Wednesday, (May 13,) at 12 o'clock, the Senate shall proceed to vote, without debate, on the several articles, &c.; offered and rejected, (yeas 13, nays 27) ..... II—476
remarks by ..... I—16, 247, 301, 370, 485, 490, 498, 634, 700, 726, 728, 738, 741 II—13, 307, 389, 470, 471, 472, 476, 486. III—388
Application of counsel for forty days to prepare answer ..... I—19
denied ..... I—24
for thirty days to prepare for trial ..... I—69
denied, (yeas 12, nays 41) ..... I—82
for three days to prepare proofs ..... I—367, 369
granted ..... I—371
for adjournment in consequence of illness of Mr. Stanbery ..... I—533
Argument, right of counsel making motion to open and close, thereon ..... I—77
final, orders offered to fix the number of speakers on, by—
Manager Bingham ..... I—450
Mr. Frelinghuysen ..... I—451
Mr. Sumner ..... I—491, 497, 532
Mr. Sherman ..... I—495, 741. II—6
Mr. Conness ..... I—535. II—5, 8
Mr. Doolittle ..... I—536
Mr. Stewart ..... I—741
Mr. Vickers ..... II—3, 4
Mr. Johnson ..... II—5
Mr. Corbett ..... II—7
Mr. Henderson ..... II—8
Mr. Trumbull ..... II—11
Mr. Buckalew ..... II—12
Mr. Cameron ..... II—12
Mr. Yates ..... II—12

Digitized by Google

Argument, final—Continued.
order that as many of managers as desire be permitted to file, or address Senate orally, the conclusion of oral argument to be by one manager—[*By Mr. Trumbull.*]
offered ..... II—11
adopted, (yeas 28, nays 22) ..... II—14
Argument on the case by—
Manager Butler ..... I—87
Mr. Curtis ..... I—377, 390, 397
Manager Logan ..... II—14
Manager Boutwell ..... II—67, 84, 99
Mr. Nelson ..... II—118, 141
Mr. Groesbeck ..... II—189
Manager Stevens ..... II—219
Manager Williams ..... II—230, 249
Mr. Evarts ..... II—269, 284, 306, 336
Mr. Stanbery ..... II—359, 360
Manager Bingham ..... II—389, 447
Armstrong, William W. (See *Testimony.*)
Articles of impeachment exhibited by House of Representatives ..... I—6
vote on. (See *Question.*)

B.

Bayard, James A., a senator from Delaware ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court ..... III—372
order by—
that no senator shall speak more than once, nor to exceed thirty minutes, during deliberations on final question; offered and rejected, (yeas 16, nays 34) ..... II—218
remarks by ..... II—7, 218
Bingham, John A., of Ohio, a manager, chairman ..... I—4, 17
motions by—
that upon filing replication the trial proceed forthwith; offered and denied, (yeas 25, nays 26) ..... I—25
to amend Rule XXI, so as to allow such of managers and counsel as desire to be heard to speak on final argument ..... I—450
argument by—
on application of counsel for forty days to prepare answer ..... I—20, 22
for thirty days to prepare for trial ..... I—69, 77, 78
on motion to fix day for trial to proceed ..... I—32, 33
on right of managers to close debate on interlocutory questions ..... I—77
on authority of Chief Justice to decide questions of evidence ..... I—180, 181, 183
on motion in regard to rule limiting argument on final question ..... I—450, 534
on right of Counsel to renew examination of a witness recalled by court ..... I—524, 525, 527
on admissibility—
of Adjutant General Thomas's declarations to Mr. Burleigh, February 21, 1868 ..... I—202, 206
to clerks of War Department ..... I—213
of President's letter to General Grant, unaccompanied with enclosures ..... I—244
of appointment of Edmund Cooper, to be Assistant Secretary of the Treasury ..... I—262
of President's declarations to Adjutant General Thomas, February 21 ..... I—425
prior to March 9 ..... I—430
of question, Whether General Sherman gave President an opinion, &c ..... I—498, 505, 506
of President's message to Senate, February 24 ..... I—540, 541, 542, 543
final, on the case ..... II—389, 447
Blodgett, Foster. (See *Testimony.*)
Boutwell, George S., of Massachusetts, a manager ..... I—4, 17
argument by—
on application of counsel for thirty days to prepare for trial ..... I—78
on authority of Chief Justice to decide questions of evidence ..... I—181, 184
on admissibility—
of telegrams relating to the reconstruction of Alabama ..... I—274
of extracts from records of Navy Department ..... I—567
final, on the case ..... II—67, 84, 99
remarks on the case of the removal of Timothy Pickering ..... I—367
on motion relating to the number of speakers on final argument ..... I—495
Brief of authorities upon the law of impeachable crimes and misdemeanors—[*By Hon. William Lawrence, M. C., of Ohio*] ..... I—123. III—355
Buckalew, Charles R., a senator from Pennsylvania ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court ..... III—383, 385
order by—
that the conclusion of the oral argument be by one manager, as provided in Rule XXI; offered and agreed to ..... II—12
prescribing form of final question; offered ..... II—478
that the views of Chief Justice on the form of putting final question be entered on the journal; offered and agreed to ..... II—480
remarks by ..... I—451, 728, 740, 741. II—5, 12, 478, 480, 483, 489
opinion on the case ..... III—218
Burleigh, Walter A. (See *Testimony.*)
Butler, Benjamin F., of Massachusetts, a manager ..... I—417
argument by—
on motion to fix a day for trial to proceed ..... I—23
on motion relating to the number of speakers on final argument ..... I—496
on application of counsel for thirty days to prepare for trial ..... I—81
opening, on the case ..... I—87
on authority of Chief Justice to decide questions of evidence ..... I—176, 177, 181, 184
on right of counsel to renew examination of a witness recalled by court ..... I—523
on admissibility—
of Adjutant General Thomas's declarations to Mr. Burleigh, Feb. 21, 1868 ..... I—187, 192, 193, 195 207
to clerks of War Department ..... I—212
of appointment of Edmund Cooper to be Assistant Secretary of Treasury ..... I—259, 260, 262 264, 265

Digitized by Google

Butler, Benjamin F., of Massachusetts, argument by, on admissibility—Continued.
of telegrams relating to the reconstruction of Alabama ..... I—270, 271, 273, 275, 276
of Chronicle's report of President's speech in reply to Hon. Reverdy Johnson ..... I—286, 289, 297, 301
of Leader's report of President's speech at Cleveland ..... I—322, 323, 324
of President's declarations to Adjutant General Thomas, Feb. 21 ..... I—420, 421, 422
prior to March 9, as to use of force ..... I—429, 430
of conversations between President and General Sherman, Jan. 14 ... I—462, 463, 465, 468, 469, 470, 471 472, 473, 475, 479
of question respecting Department of the Atlantic ..... I—481, 482
of tender of War Office to General Sherman ..... I—482, 483, 484
of President's purpose to get the question before the courts ..... I—485, 486
of question, Whether General Sherman formed and gave President an opinion, &c ..... I—500, 501, 504
of affidavit and warrant of arrest of Lorenzo Thomas ..... I—510, 511, 512, 513, 514
of President's message to Senate, Feb. 24 ..... I—538, 539, 540, 541, 542, 543
of extracts from records of Navy Department ..... I—561, 562, 563, 564, 565, 566
of employment of counsel by President to get up test case ..... I—597, 600, 604
of President's declarations to Mr. Perrin, Feb. 21 ..... I—625, 627
to Secretary Welles ..... I—667, 671
of advice to President by Cabinet touching constitutionality of tenure-of-office act ..... I—676, 677, 678
touching construction of tenure-of-office act ..... I—694, 695
of cabinet consultations in regard to obtaining a judicial decision, &c ..... I—698, 699
of papers in Mr. Blodgett's case ..... I—722, 723, 724, 725
remarks on application of counsel for adjournment ..... I—628, 629
on the Alta Vela letter ..... II—262, 267, 268, 281, 282, 284

C.

Cameron, Simon, a senator from Pennsylvania ..... I—11
order by—
that all the managers and counsel be permitted to file arguments by eleven o'clock, April 23; offered and rejected ..... II—12
order by—
that Senate hereafter hold night sessions from eight until eleven p. m.; offered ..... II—283
tabled, (yeas, 32; nays, 17) ..... II—308
remarks by ..... I—184, 240, 266, 267, 370, 371, 632, 726. II—12, 268, 283, 469, 470, 473, 481, 482, 487, 491, 497
question by ..... I—267
Cattell, Alexander G., a Senator from New Jersey ..... I—11
opinion on the case ..... III—178
Chandler, William E. (See *Testimony.*)
Chandler, Zachariah, a senator from Michigan ..... I—11
remarks by ..... I—674. II—482, 483
Chew, Robert S. (See *Testimony.*)
Chief Justice, attendance of, requested as presiding officer in the trial ..... I—10
oath administered to ..... I—11
casting vote given by ..... I—185, 276
resolution denying authority of, to vote on any question during the trial—[*By Mr. Sumner.*]
offered and rejected, (yeas, 22; nays, 26) ..... I—185
order denying privilege of, to rule questions of law—[*By Mr. Drake.*]
offered and rejected, (yeas, 20; nays, 30,) ..... I—186
order denying authority of, to give casting vote—[*By Mr. Sumner.*]
offered and rejected, (yeas, 21; nays, 27) ..... I—187
order that the ruling of, upon all question of evidence, shall stand as the judgment of the Senate unless a formal vote be asked, &c.—[*By Mr. Henderson.*]
offered ..... I—185
agreed to, (yeas, 31; nays, 19) ..... I—186
views of, on form of putting final question ..... II—480
appeals from decisions of ..... II—488. III—384
opinion of Mr. Sumner on the question, Can the, presiding in the Senate, rule or vote? ..... III—281
Clarke, D. W. C. (See *Testimony.*)
Clephane, James O. (See *Testimony.*)
Cole, Cornelius, a senator from California ..... I—11
remarks by ..... I—508. II—479
Committee (in House) to communicate to Senate the action of the House directing an impeachment of Andrew Johnson; ordered ..... I—2
appointed ..... I—3
appear at bar of Senate ..... I—5
report to House ..... I—3
(in House) to prepare articles of impeachment against Andrew Johnson; ordered ..... I—2
appointed ..... I—3
report of ..... I—3, 6
(in Senate) to consider and report on the message of the House relating to the impeachment of Andrew Johnson; ordered and appointed ..... I—5
report of ..... I—5, 13
(in Senate) to request the attendance of the Chief Justice as presiding officer in the trial; ordered and appointed ..... I—10
Competency. (See *Evidence.*)
Conkling, Roscoe, a senator from New York ..... I—11
orders by—
that Rule XXIII be amended by inserting "subject to operation of Rule VII." offered and agreed to ..... I—18
that, unless otherwise ordered, trial proceed immediately after replication filed; offered ..... I—31
agreed to, (yeas, 40; nays, 10) ..... I—33
that the Senate commence the trial 30th March instant; agreed to, (yeas, 28; nays, 24) ..... I—85
prescribing form of final question; offered ..... II—478
that Senate proceed to vote on remaining articles; rejected, (yeas, 26; nays, 28) ..... II—492
remarks by ..... I—17. 18, 24, 31, 32, 33, 85, 179, 180, 208, 210, 236 246, 267, 277, 301, 324. 359, 370, 390. 450, 451, 452, 490, 497, 521, 537, 565, 673, 676, 699, 716
II—5, 6, 99, 188, 203, 280, 306, 322, 470, 471, 472, 474, 475, 476, 478, 488, 489, 492, 493, 494
questions by ..... I—246, 504

Conness, John, a senator from California ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court ..... III—367, 395
orders by—
that Rule XXI be amended to allow as many of managers and counsel to speak on final argument as choose, four days to each side, managers to open and close; offered and rejected, (yeas, 19; nays, 27) ..... I—535
that hereafter Senate meet at eleven a. m.; offered ..... I—631
adopted, (yeas, 29; nays, 14) ..... I—633
that such of managers and counsel as choose have leave to file arguments before April 24; offered and disagreed to, (yeas, 24; nays, 25) ..... II—5
prescribing form of final question; offered ..... II—478
remarks by ..... I—36, 161, 185, 207, 246, 247, 268, 276, 298, 325, 367, 370, 371, 414, 462, 507, 514, 519, 532, 535, 589. 611, 612, 628, 631, 633, 666, 673, 679, 699, 706, 716
II—3, 4, 5, 6, 8, 10, 11, 83, 84, 413, 469, 470, 471, 472, 473, 474, 476, 478, 481, 483, 484, 488, 492, 493, 494, 498
question by ..... I—727
Conversations. (See *Evidence; Testimony.*)
Corbett, Henry W., a senator from Oregon ..... I—11
order by—
that two of counsel have privilege of filing written or making an oral address, &c.; amendment offered ..... II—7
withdrawn ..... II—8
remarks by ..... II—7, 8, 11
Counsel for respondent ..... I—18, 19, 34
Cox, Walter S. (See *Testimony.*)
Cragin, Aaron H., a senator from New Hampshire ..... I—11
remarks by ..... I—673
Creecy, Charles E. (See *Testimony.*)
Curtis, Benjamin R., of Massachusetts, counsel ..... I—19
motion by—
for an allowance of three days to prepare proofs; offered ..... I—367, 369
granted ..... I—371
argument by—
on application for forty days to prepare answer ..... I—20
for time to prepare proofs ..... I—367, 369
opening, for the defence ..... I—377, 390, 397
on admissibility—
of Adjutant General Thomas's declarations to Mr. Burleigh February 21, 1868 ..... I—198, 199
of President's letter to General Grant, unaccompanied with enclosures ..... I—244
of telegrams relating to the reconstruction of Alabama ..... I—270, 271, 272
of President's message to Senate February 24 ..... I—537, 538
of extracts from records of Navy Department ..... I—562, 563, 564, 565, 566, 567, 568
of employment of counsel by President to get up test case ..... I—602, 604
of President's declarations to Secretary Welles ..... I—669
of advice to President by cabinet touching constitutionality of tenure-of-office act ... I—677, 678, 689, 692

D.

Davis, Garrett, a senator from Kentucky ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court ..... III—363, 366
order by—
that a court of impeachment cannot be legally formed while senators from certain States are excluded: offered and rejected, (yeas, 2; nays, 49) ..... I—36
remarks by ..... I—35, 487, 587, 519, 528. II—249, 282, 469, 482, 485
opinion on the case ..... III—156
Dean, Joseph A. (See *Testimony.*)
Declarations. (See *Evidence; Testimony.*)
Dixon, James, a senator from Connecticut ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court .... III—388, 389, 390, 391, 392, 393, 394, 395, 396
Documents. (See *Evidence.*)
Doolittle, James R., a senator from Wisconsin ..... I—34
order by—
that on final argument managers and counsel shall alternate, two and two; managers to open and close: offered and indefinitely postponed. (yeas, 34; nays, 15) ..... I—536
remarks ..... I—230, 276, 486, 489, 535, 436, 611, 632, 740, 741. II—9, 487, 492, 493
opinion on the case ..... III—244
Drake, Charles D., a senator from Missouri ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court ..... III—380, 389, 390, 393
orders by—
that respondent file answer on or before 20th March: agreed to, (yeas, 28; nays, 20) ..... I—35
reconsidered, (yeas, 27; nays, 23) ..... I—35
that Chief Justice presiding has no privilege of ruling questions of law on the trial, but all such questions should be submitted to Senate alone: offered and rejected, (yeas, 20; nays, 30) ..... I—186
that votes upon incidental questions shall be without a division, unless requested by one-fifth of members present, or presiding officer: (amendment to Rule VII,) offered ..... I—230
agreed to ..... I—277
that any senator shall have permission to file his written opinion at the time of giving his vote: offered ..... II—476
rejected, (yeas, 12; nays, 38) ..... II—477
that the fifteen minutes allowed by Rule XXIII shall be for the whole deliberation on final question, and not to final question on each article: offered ..... II—474
adopted ..... II—478
remarks by ..... I—33, 82, 175, 176, 179, 186, 207, 208, 209, 230, 247, 255, 276, 277, 278, 280, 298, 325, 336, 426, 480, 485, 489, 490, 497, 502, 518, 519, 520, 529, 533, 535, 536, 545, 605, 634, 680, 693, 696
II—84, 188, 472, 474, 476, 477, 484, 487, 491, 497, 498
question by ..... I—533

E.

Edmunds, George F., a senator from Vermont ..... I—17
orders by—
that answer be filed April 1, replication three days thereafter, and the matter stand for trial April 6, 1868: offered ..... I—24
that when the doors shall be closed for deliberation upon final question, the official reporters shall take down debates to be reported in proceedings: offered ..... II—141
not indefinitely postponed, (yeas 20, nays 27) ..... II—188
read ..... II—218, 471
tabled, (yeas 28, nays 20) ..... II—474
that the standing order of the Senate, that it will proceed at twelve o'clock noon to-morrow to vote on the articles, be rescinded—[*May* 11, 1868:] offered ..... II—482
agreed to ..... II—483
that the Senate now proceed to vote upon the articles, according to the rules of the Senate offered May 16 ..... II—485
agreed to ..... II—486
remarks by ..... I—24, 85, 86, 208, 211, 277, 336, 390, 451, 519, 534, 537, 566, 597, 680, 741
II—3, 10, 11, 12, 14, 141, 188, 218, 268, 471, 474, 475, 476, 479, 482, 483, 484, 485, 490, 493
questions by ..... I—566, 597
opinion on the case ..... III—82
Emory, William H. (See *Testimony.*)
Evarts, William M., of New York, counsel ..... I—19
motions by—
that after replication filed, counsel be allowed reasonable time to prepare for trial: offered ..... I—53
for an adjournment in consequence of illness of Mr. Stanbery ..... I—533
argument by—
on application for thirty days to prepare for trial ..... I—68, 71
on authority of Chief Justice to decide questions of evidence ..... I—184
on right of counsel to renew examination of a witness recalled by court ..... I—522, 524, 526
on admissibility—
of Adjutant General Thomas's declarations to Mr. Burleigh, February 21, 1868 ..... I—206, 207
to clerks of War Department ..... I—212
of President's letter to General Grant, unaccompanied with enclosures ..... I—244, 245
of appointment of Edmund Cooper to be Assistant Secretary of the Treasury ..... I—258, 263, 264
of telegrams relating to the reconstruction of Alabama ..... I—270, 271, 272, 273
of Chronicle's report of President's speech in reply to Hon. Reverdy Johnson ..... I—286, 288, 289
of Leader's report of President's speech at Cleveland ..... I—322, 323, 324
of President's declarations to Adjutant General Thomas, February 21 ..... I—424
prior to March 9 ..... I—429, 430
of President's conversations with General Sherman, January 14 ..... I—470, 475
of tender of War Office to General Sherman ..... I—482, 484
of question Whether General Sherman gave President an opinion, &c ..... I—501, 504, 506
of affidavit and warrant of arrest of Lorenzo Thomas ..... I—510, 511, 514
of President's message to Senate, February 24 ..... I—538, 539, 542, 543
of extracts from records of Navy Department ..... I—566, 568
of employment of counsel by President to get up test case ..... I—598, 603
of President's declaration to Mr. Perrin ..... I—625, 626, 627
to Secretary Welles ..... I—668, 672, 673
of advice to President by his cabinet touching constitutionality of tenure-of-office act ..... I—676, 678
touching construction of tenure-of-office act ..... I—694, 696
of cabinet consultations in regard to obtaining a judicial decision, &c ..... I—699
of papers in Mr. Blodgett's case ..... I—722, 723, 724, 725
final, on the case ..... II—269, 284, 308, 336
remarks announcing illness of Mr. Stanbery ..... I—533, 590, 716
on order in regard to limiting argument on final question ..... I—497, 534. II—7, 9
on application for adjournment ..... I—628, 629, 631
Evidence, question, Whether objections to, should be decided by Chief Justice, or, in first instance, submitted to Senate—[*By Mr. Drake*] ..... I—175, 179
discussed by—
Manager Butler ..... I—176, 177, 181, 184
Manager Bingham ..... I—180, 181, 183
Manager Boutwell ..... I—181, 184
Mr. Evarts ..... I—184
presiding officer may rule all questions of, which ruling shall stand as the judgment of the Senate, unless a vote be asked, &c.; or he may, in first instance, submit such questions to Senate—[*By Mr. Henderson*]—offered; I—185: agreed to; (yeas 31, nays 19) ..... I—186
admissibility of—
declarations of Adjutant General Thomas, February 21, as to the means by which he intended to obtain possession of War Department: (objected to by *Mr. Stanbery*) ..... I—175, 188
discussed by—
Manager Butler ..... I—187, 192, 193, 195, 207
Mr. Stanbery ..... I—188, 192, 193, 195, 206, 207
Mr. Curtis ..... I—198, 199
Manager Bingham ..... I—202, 206
Mr. Evarts ..... I—206, 207
admitted; (yeas 39, nays 11) ..... I—209
declarations of Adjutant General Thomas to clerks of War Department, antecedent to his appointment as Secretary of War *ad interim*, as to his intention when he came in command: (objected to by *Mr. Evarts*) ..... I—212
discussed by—
Mr. Evarts ..... I—212
Manager Butler ..... I—212
Manager Bingham ..... I—213
admitted; (yeas 28, nays 22) ..... I—214
letter of President to General Grant, February 10, 1868, unaccompanied by other letters referred to therein: (objected to by *Mr. Stanbery*) ..... I—243

Digitized by Google

Evidence, admissibility of—
President's letter to General Grant—Continued.
discussed by—
Mr. Stanbery....I—244, 245
Manager Wilson....I—244, 246
Mr. Evarts....I—244, 246
Manager Bingham....I—244
Mr. Curtis....I—244
objection not sustained: (yeas 20, nays 29)....I—247
appointment of Edmund Cooper, private secretary of President, as Assistant Secretary of Treasury: (objected to by *Mr. Evarts*)....I—258
discussed by—
Mr. Evarts....I—258, 263, 264
Manager Butler....I—259, 260, 263, 264, 265
Mr. Stanbery....I—260, 261, 262, 264
Manager Bingham....I—262
not received; (yeas 22, nays 27)....I—268
telegrams between President and Lewis E. Parsons, January 17, 1867, in relation to constitutional amendment and reconstruction of Alabama: (objected to by *Mr. Stanbery*)....I—270
discussed by—
Manager Butler....I—270, 271, 272, 273, 275, 276
Mr. Evarts....I—270, 271, 272, 273
Mr. Stanbery....I—270
Mr. Curtis....I—270, 271, 272
Manager Boutwell....I—274
admitted; (yeas 27, nays 17)....I—276
Chronicle's report of President's speech, August 18, 1866, in reply to Hon. Reverdy Johnson: (objected to by *Mr. Evarts*)....I—286
discussed by—
Mr. Evarts....I—286, 288, 289
Manager Butler....I—286, 289, 297, 301
withdrawn....I—301
Leader's report of President's speech at Cleveland, September 3, 1866: (objected to by *Mr. Evarts*)....I—322
discussed by—
Mr. Evarts....I—322, 323, 324
Manager Butler....I—322, 323, 324
admitted; (yeas 35, nays 11)....I—325
declarations of President to Adjutant General Thomas, February 21, 1868, after order for removal of Mr. Stanton, to show an absence of purpose to use force; (objected to by *Manager Butler*....I—420
discussed by—
Manager Butler....I—420, 421, 422
Mr. Stanbery....I—421
Mr. Evarts....I—424
Manager Bingham....I—425
admitted; (yeas 42, nays 10,)....I—426
declarations of President to Adjutant General Thomas prior to 9th March, in respect to use of force to get possession of the War Office; (objected to by *Manager Butler*)....I—429
discussed by—
Manager Butler....I—429, 430
Mr. Evarts....I—429, 430
Manager Bingham....I—430
admitted....I—430
conversations between President and Lieutenant General Sherman, January 14, 1868, in regard to removal of Mr. Stanton; (objected to by *Manager Butler*)....I—462
discussed by—
Mr. Stanbery....I—462, 463, 465, 468, 469, 471, 472
Manager Butler....I—462, 463, 465, 468, 469, 470, 471, 472, 473, 475, 479
Mr. Evarts....I—470, 475
Manager Wilson....I—478, 479
not admitted, (yeas 23, nays 28)....I—481
question in regard to creation of department of the Atlantic; (objected to by *Manager Butler*)....I—481
discussed by—
Manager Butler....I—481, 482
Mr. Stanbery....I—481, 482
not admitted....I—482
tender to General Sherman of appointment as Secretary of War *ad interim*; (objected to by *Manager Butler*)....I—482
discussed by—
Manager Butler....I—482, 483
Mr. Evarts....I—482
Mr. Stanbery....I—482
admitted....I—483
question, Whether at the first offer of War Office to General Sherman anything further passed in reference to the tender or acceptance of it; (objected to by *Manager Butler*)....I—484
discussed by—
Manager Butler....I—484
Mr. Evarts....I—484
not admitted, (yeas 23, nays 29)....I—485
President's declaration of purpose of getting Mr. Stanton's right to office before the courts; (objected to by *Manager Butler*)....I—485
discussed by—
Manager Butler....I—485, 486
Mr. Stanbery....I—485
Mr. Evarts....I—486
not admitted, (yeas 7, nays 44)....I—487
President's declaration of purpose in tendering General Sherman the appointment of Secretary of War *ad interim*; (objected to by *Manager Bingham*)....I—488
not admitted, (yeas 25, nays 27)....I—489

Digitized by Google

Evidence, admissibility of—Continued.
President's declarations to General Sherman in reference to use of threats or force to get possession of the War Office; (objected to by *Manager Butler*) ..... I—489
not admitted ..... I—490
question, Whether General Sherman gave President an opinion as to advisability of a change in the War Department; (objected to by *Manager Butler*) ..... I—498
discussed by—
Manager Bingham ..... I—498, 505, 506
Mr. Stanbery ..... I—499, 501, 501
Manager Butler ..... I—500, 501, 504
Mr. Evarts ..... I—501, 504, 506
not admitted, (yeas 15, nays 35) ..... I—507
advice to President to appoint some person in place of Mr. Stanton: (objected to by *Manager Butler*) ... I—507
not admitted, (yeas 16, nays 32) ..... I—508
affidavit of Edwin M. Stanton and warrant of arrest of Lorenzo Thomas: (objected to by *Manager Butler*) ..... I—510
discussed by—
Manager Butler ..... I—510, 511, 512, 513, 514
Mr. Evarts ..... I—510, 511, 514
Mr. Stanbery ..... I—512, 513, 514
admitted; (yeas 34, nays 17) ..... I—515
question, Whether President stated to General Sherman his purpose in tendering him the office of Secretary of War *ad interim*: (objected to by *Manager Bingham*) ..... I—517
admitted; (yeas 26, nays 22) ..... I—518
President's declaration of purpose in tendering General Sherman the office of Secretary of War *ad interim*: (objected to by *Manager Bingham*) ..... I—518
admitted; (yeas 26, nays 25) ..... I—530
message of President to Senate, February 24, 1868, in response to Senate resolution of February 21, 1868: (objected to by *Manager Butler*) ..... I—538
discussed by—
Manager Butler ..... I—538, 539, 540, 541, 542, 543
Mr. Curtis ..... I—537, 538
Mr. Evarts ..... I—538, 539, 542, 543
Manager Bingham ..... I—540, 541, 542, 543
not admitted ..... I—544
extracts from records of Navy Department, exhibiting practice in respect to removals: (objected to by *Manager Butler*) ..... I—561
discussed by—
Manager Butler ..... I—561, 562, 563, 564, 565, 566
Mr. Curtis ..... I—562, 563, 564, 565, 566, 567, 568
Mr. Evarts ..... I—566, 568
Manager Boutwell ..... I—567
admitted; (yeas 36, nays 15) ..... I—568
employment of counsel by President to raise question of Mr. Stanton's right to hold the office of Secretary of War against authority of President: (objected to by *Manager Butler*) ..... I—597
discussed by—
Manager Butler ..... I—597, 600, 604
Mr. Evarts ..... I—598, 603
Mr. Curtis ..... I—602, 604
Manager Wilson ..... I—602
admitted; (yeas 29, nays 21) ..... I—605
acts toward getting out *habeas corpus* in the case of Lorenzo Thomas: (objected to by *Manager Butler*) I—608
admitted; (yeas 27, nays 23) ..... I—609
acts, after failure to obtain *habeas corpus*, in pursuance of President's instructions to test the right of Mr. Stanton to continue in office: (objected to by *Manager Butler*) ..... I—610
admitted; (yeas 27, nays 23) ..... I—612
declarations of President to Mr. Perrin, February 21, 1868, in reference to removal of Mr. Stanton, and nomination of a successor: (objected to by *Manager Butler*) ..... I—625
discussed by—
Manager Butler ..... I—625, 627
Mr. Evarts ..... I—625, 626, 627
Manager Wilson ..... I—626
not admitted; (yeas 9, nays 37) ..... I—628
President's declarations to Secretary Welles, February 21, in relation to removal of Mr. Stanton: (objected to by *Manager Butler*) ..... I—667
discussed by—
Manager Butler ..... I—667, 671
Mr. Evarts ..... I—668, 672, 673
Mr. Curtis ..... I—669
admitted; (yeas 26, nays 23) ..... I—674
advice to President by cabinet touching constitutionality of tenure-of-office act: (objected to by *Manager Butler*) ..... I—676
discussed by
Manager Butler ..... I—676, 677, 678
Mr. Evarts ..... I—676, 678
Mr. Curtis ..... I—677, 678, 689, 692
Manager Wilson ..... I—681
not admitted; (yeas 20, nays 29) ..... I—693
advice to President by cabinet in regard to construction of tenure-of-office act, and its application to Secretaries appointed by President Lincoln; (objected to by *Manager Butler*) ..... I—694
discussed by—
Mr. Evarts ..... I—694, 696
Manager Butler ..... I—694, 695
not admitted; (yeas 22, nays 26) ..... I—697
cabinet consultations in regard to obtaining a judicial decision on constitutionality of tenure-of-office act; (objected to by *Manager Butler*) ..... I—698
discussed by—
Manager Butler ..... I—698, 699
Mr. Evarts ..... I—699
not admitted; (yeas 19, nays 30) ..... I—700

Evidence, admissibility of—Continued.
question, Whether any suggestions were made in cabinet looking to the vacation of any office by force; (objected to by *Manager Butler*).....I—700
not admitted; (yeas 18, nays 26).....I—701
opinions given to President by cabinet on question, Whether the Secretaries appointed by President Lincoln were within the provisions of tenure-of-office act; (objected to by *Manager Bingham*).I—715
not admitted; (yeas 20, nays 26).....I—716
answer of Foster Blodgett to Postmaster General's notice of his suspension from the office of postmaster at Augusta, Ga.; (objected to by *Mr. Evarts*).....I—722
discussed by—
Mr. Evarts.....I—722, 723, 724, 725
Manager Butler.....I—722, 723, 724, 725
not admitted.....I—726
nominations of Lieutenant General Sherman, February 13, 1868, and of Major General George H. Thomas, February 21, 1861, to be Generals by brevet; (objected to by *Mr. Evarts*).....I—736
not admitted; (yeas 14, nays 35).....I—738
Evidence, documentary, for the prosecution—
copy of oath of Andrew Johnson, President of the United States, April 15, 1865, with accompanying certificates.....I—147
copy of President Lincoln's message to Senate, January 13, 1862, nominating Edwin M. Stanton to be Secretary of War.....I—148
copy of Senate resolution in executive session, January 15, 1862, consenting to appointment of Edwin M. Stanton to be Secretary of War.....I—148
copy of President's message to Senate, December 12, 1867, announcing suspension of Edwin M. Stanton from the office of Secretary of War, and designation of General Grant as Secretary of War *ad interim*.....I—148
copy of Senate resolution, January 13, 1868, in response to message of President announcing suspension of Edwin M. Stanton, and non-concurring in such suspension.....I—155
copy of Senate order, January 13, 1868, directing Secretary to communicate copy of non-concurring resolution to President, to Edwin M. Stanton, and to U. S. Grant, Secretary of War *ad interim*....I—155
copy of President's message to Senate, February 21, 1868, announcing removal of Edwin M. Stanton from office, and designation of the Adjutant General of the army as Secretary of War *ad interim*..I—156
copy of President's order, February 21, 1868, removing Edwin M. Stanton from the office of Secretary of War.....I—156
copy of President's letter of authority to Lorenzo Thomas, February 21, 1868, to act as Secretary of War *ad interim*, and directing him immediately to enter upon duties.....I—156
copy of Senate resolution, February 21, 1868, that President has no power to remove the Secretary of War and to designate any other officer to perform duties of that office *ad interim*.....I—157
copy of Senate order, February 21, 1868, directing Secretary to communicate copies of foregoing resolution to President, to Secretary of War, and to Adjutant General of the army.....I—157
copy of President Lincoln's commission to Edwin M. Stanton as Secretary of War, January 15, 1862.I—157
commission of Edmund Cooper as Assistant Secretary of Treasury, November 20, 1867.....I—163
letter of authority to Edmund Cooper, December 2, 1867, to act as Assistant Secretary of Treasury..I—164
copy of General Orders No. 15, March 12, 1868, requiring all orders relating to military operations issued by President or Secretary of War to be issued through General of the army.....I—237
copy of Brevet Major General W. H. Emory's commission, July 17, 1866.....I—239
Special Orders No. 426, August 27, 1867, assigning General Emory to command of department of Washington.....I—240
order of President, February 13, 1868, that Brevet Major General Thomas resume duties as Adjutant General.....I—240
letter of General Grant, January 24, 1868, requesting to have in writing order given him verbally by President to disregard orders of E. M. Stanton as Secretary of War, &c.....I—240
President's instructions to General Grant, January 29, 1868, not to obey orders from War Department, unless, &c.....I—240
letter of President to General Grant, February 10, 1868, in regard to his having vacated the office of Secretary of War *ad interim*.....I—241
copy of President's letter of authority to Lorenzo Thomas to act as Secretary of War *ad interim*...I—248
copies of order removing Edwin M. Stanton, and letter of authority to General Thomas with indorsements thereon, forwarded by President to Secretary of Treasury for his information.....I—248, 249
copy of General Orders No. 17, March 14, 1867, requiring all orders relating to military operations to be issued through General of the army.....I—249
copy of order of General of army to General Thomas to resume duties as Adjutant General.....I—256
message of President communicating report of Secretary of State, showing proceedings under concurrent resolution of the two houses requesting President to submit to legislatures of States an additional article to the Constitution.....I—278
report of President's speech, August 18, 1866, in reply to Hon. Reverdy Johnson, as sworn to by Francis H. Smith.....I—298
report of President's speech, August 18, 1866, revised by William G. Moore, his secretary.....I—301
at Cleveland, September 3, 1866, in Cleveland Leader.....I—325
at Cleveland, September 3, 1866, by D. C. McEwen.....I—328
at Cleveland, September 3, 1866, in Cleveland Herald.....I—333
at St. Louis, September 8, 1866, in Missouri Democrat.....I—340
at St. Louis, September 8, 1866, in St. Louis Times.....I—348
forms of various commissions as issued by President before and after passage of civil-tenure act....I—353
list of removals of heads of departments at any time by President during session of Senate.....I—358
list of appointments of heads of departments at any time by President without advice and consent of Senate and while Senate was in session.....I—358
correspondence between President John Adams and Timothy Pickering, May 1800, relating to removal of Mr. Pickering from office of Secretary of State.....I—362
copy of President John Adams's message, May 12, 1800, nominating John Marshall to be Secretary of State in place of Timothy Pickering removed, and action of Senate thereon.....I—365
letter from President, August 14, 1867, notifying Secretary of Treasury, "in compliance with requirements" of tenure-of-office act, of suspension of Edwin M. Stanton.....I—364
letter of Secretary of Treasury, August 15, 1867, notifying heads of bureaus, in compliance with requirements of tenure-of-office act, of suspension of Edwin M. Stanton.....I—366
executive messages of President communicating information of suspension of several officers.....I—369
communication from Secretary of State, December 19, 1867, reporting to President, in compliance with provisions of tenure-of-office act, the suspension of the consul at Brunai, Borneo.....I—369

Digitized by Google

Evidence, documentary, for the prosecution—Continued.
copy of letter from Adjutant General Thomas to President, February 21, 1868, reporting delivery of President's communication to Edwin M. Stanton removing him from office, and accepting appointment of Secretary of War *ad interim* ..... I—376
Evidence, documentary, for the defence—
affidavit of Edwin M. Stanton, and warrant of arrest of Lorenzo Thomas, February 22, 1868..... I—515
docket of entries as to disposition of case of United States *vs.* Lorenzo Thomas..... I—531
President's nomination of Thomas Ewing, sen., to be Secretary of War, February 22, 1868..... I—537
copy of Senate proceedings, May 13, 1800, on nomination of John Marshall to be Secretary of State, in place of Timothy Pickering, removed..... I—555
copy of President Tyler's order, February 29, 1844, appointing John Nelson, Attorney General, to discharge duties of Secretary of State *ad interim*..... I—557
copy of Senate resolution, March 6, 1844, confirming nomination of John C. Calhoun as Secretary of State, vice A. P. Upshur..... I—558
copy of President Fillmore's order, July 23, 1850, designating Winfield Scott to act as Secretary of War *ad interim*..... I—558
copy of Senate resolution, August 15, 1850, confirming nomination of Charles M. Conrad as Secretary of War..... I—558
copy of President Buchanan's order, January 10, 1861, appointing Moses Kelley to be Acting Secretary of Interior..... I—559
copy of President Lincoln's commission, March 5, 1861, to Caleb B. Smith as Secretary of Interior..I—559
copy of letters of Acting Secretary of Treasury, August 17, 1842, relating to removal of collector and appraiser in Philadelphia..... I—560
extracts from records of Navy Department exhibiting practice in respect to removals..... I—569
list of civil officers of Navy Department, appointed for four years under act of May 15, 1829, and removable at pleasure, who were removed, their terms not having expired..... I—573
copies of documents from State Department, showing practice of government in removal of officers during session of Senate, during recess, and covering all cases of vacancy..... I—574, 590
copies of documents from Post Office Department, showing removals of postmasters during session of Senate and *ad interim* appointments..... I—591
message of President Buchanan, January 15, 1861, in answer to Senate resolution respecting vacancy in the office of Secretary of War..... I—583
list of persons who discharged duties of cabinet officers, whether by appointment made in recess and those confirmed by Senate, as well as those acting *ad interim*, or simply acting..... I—585
statement of beginning and ending of each legislative session of Congress from 1789 to 1868..... I—594
statement of beginning and ending of each special session of Senate from 1789 to 1868 ..... I—595
copy of President Adams's commission to George Washington, July 4, 1798, constituting him Lieutenant General of the army..... I—653
tables from Department of Interior, showing removals of officers, date, name, office, and whether removal was during recess or during session of Senate ..... I—654
list of consular officers appointed during session of Senate where vacancies existed when appointments were made ..... I—662
form of navy agent's commission ..... I—705
official action of Post Office Department in removal of Foster Blodgett ..... I—709
Evidence, documentary, for the prosecution, in rebuttal—
Journal of first Congress, 1774–'75, exhibiting report of committee to draft commission to General George Washington..... I—718
letter of James Guthrie, Secretary of Treasury, August 23, 1855, as to practice of government in appointing officers during recess to fill vacancies existing before adjournment..... I—719
copy of indictment in case of Foster Blodgett in district court of United States for southern district of Georgia ..... I—720
list of the various officers in United States affected by President's claim of right to remove at pleasure and appoint *ad interim*, their salaries, &c ..... I—729
Ewing, Thomas, sen., nomination of, to be Secretary of War..... I—508, 516, 537, 555, 556

F.

Ferry, Orris S., a senator from Connecticut..... I—11
orders by—
that the hour of meeting be at 11 a. m., and that there be a recess of thirty minutes each day at 2 p. m.: offered and rejected, (yeas 24, nays 26)..... I—536
that tabular statements presented by Manager Butler be omitted from published proceedings:
offered..... I—633
adopted..... I—634
remarks by ..... I—186, 197, 336, 536, 602, 632, 633, 701, 716. II—4, 495. III—394
question by..... I—602
opinion on the case..... III—121
Ferry, Thomas W. (See *Testimony.*)
Fessenden, William P., a senator from Maine..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court..III—366, 367, 374, 401
remarks by..... I—176, 266, 267, 268, 336, 478, 479. II—6, 7, 195, 469, 473, 483, 485
questions by ..... I—267, 268
opinion on the case ..... III—16
Fowler, Joseph S., a senator from Tennessee..... I—11
remarks by..... I—175, 276. II—7
opinion on the case ..... III—193
Frelinghuysen, Frederick T., a senator from New Jersey..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court .....III—380, 385
order by—
that as many of managers and counsel as shall choose be permitted to speak on final argument, offered and laid over..... I—451
discussed..... I—491
modified ..... I—495
tabled, (yeas 38, nays 10) ..... I—498
remarks by ..... I—188, 451, 491, 495. II—13, 474
question by ..... I—188
opinion on the case ..... III—208

Digitized by Google

G.

Grimes, James W., a senator from Iowa ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court ....III—388, 394, 401
order by—
that hereafter the hour of meeting shall be 12 o'clock m. each day, except Sunday:
offered ..... II—99
adopted, (yeas 21, nays 13) ..... II—141
remarks by ..... I—17, 76, 179, 298, 315, 608, 701, 709. II—6, 8, 13, 99, 217, 268, 322, 360, 469, 485
question by ..... I—315
opinion on the case ..... III—328
Groesbeck, William S., of Ohio, counsel ..... I—34
argument, final, on the case ..... II—189

H.

arlan, James, a senator from Iowa ..... I—11
opinion on the case ..... III—233
Henderson, John B., a senator from Missouri ..... I—11
orders by—
that application for thirty days to prepare for trial be postponed until after replication filed: offered and not agreed to, (yeas 25, nays 29) ..... I—81
that presiding officer may rule all questions of evidence, which ruling shall stand as the judgment of the Senate, unless some member shall ask a formal vote, in which case it shall be submitted to the Senate; or he may submit any such question to a vote in the first instance, (amendment to Rule VII:)
offered ..... I—185
agreed to, (yeas 31, nays 19) ..... I—186
that, subject to Rule XXI, all managers not delivering oral arguments may file written arguments before April 24, and counsel not making oral arguments may file written arguments before April 27:
offered ..... II—8
remarks by ..... I—81, 185, 247. 265, 266, 450, 488, 529, 530, 699. II—8, 9, 10, 11, 336, 488, 491, 494
questions by ..... I—265, 529, 699
opinion on the case ..... III—295
Hendricks, Thomas A., a senator from Indiana ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court ..... III—360, 364, 392, 399, 401
order by—
that trial proceed with all convenient despatch: amendment offered and agreed to ..... I—86
prescribing form of final question: offered ..... II—478
remarks by ..... I—86, 186, 231, 565, 633. II—13, 282, 283, 473, 474, 478, 483, 484, 487, 488, 489
opinion on the case ..... III—95
Hour of meeting, order fixing, at 11 a. m.—[*By Mr. Conness.*]
offered ..... I—631
adopted, (yeas 29, nays 14) ..... I—633
order fixing, at 12 o'clock m. each day, except Sunday—[*By Mr. Grimes.*]
offered ..... II—99
adopted, (yeas 21, nays 13) ..... II—141
Howard, Jacob M., a senator from Michigan ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court ..... III—361, 367, 382, 383, 388, 389, 390, 392, 393, 401
orders by—
(in Senate,) that the message of the House, relating to the impeachment of Andrew Johnson, be referred to a select committe of seven, to consider and report thereon; agreed to ..... I—5
(in Senate,) that the Senate will take proper action on the message of the House in relation to the impeachment of Andrew Johnson: reported and agreed to ..... I—6
(in Senate,) that at 1 o'clock to-morrow afternoon, the Senate will proceed to consider the impeachment of Andrew Johnson, &c.: agreed to March 4 ..... I—9
that a summons do issue to Andrew Johnson, returnable on Friday, March 13, at 1 o'clock p. m.: adopted ..... I—16
that no senator shall speak more than once, nor to exceed 15 minutes on one question, during final deliberations: offered and rejected, (yeas 19, nays 30) ..... II—218
remarks by ..... I—5, 9, 12, 16, 17, 34, 36, 69, 77, 78. 82, 160, 180, 188, 214, 235, 265, 276, 324, 325, 346, 367, 370, 451, 486, 497, 514, 530, 566, 606, 612, 673, 680, 693, 716, 738. II—5, 10, 14, 218, 219, 282, 389, 446, 472, 485, 498
questions by ..... I—276, 530, 566, 680
opinion on the case ..... III—31
Howe, Timothy O., a senator from Wisconsin ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court ..... III—380
remarks by ..... I—36, 490, 508, 520, 533, 608, 611, 740. II—12, 282, 283, 475
opinion on the case ..... III—58
Hudson, William N. (See *Testimony.*)

I.

Impeachable crimes, definition of ..... I—88, 123, 147, 476. II—286. III—355
Impeachment of Andrew Johnson, President of the United States—
resolution (in House) providing for the, [*By Mr. Covode, Feb.* 21, 1868:] referred ..... I—1
reported ..... I—1
adopted, (yeas 126, nays 47) ..... I—2
Committee (in House) to communicate to Senate its action directing an—
ordered ..... I—2
appointed ..... I—3
appear at bar of Senate ..... I—5
report to House ..... I—3
Committee (in House) to prepare articles of—
ordered ..... I—2
appointed ..... I—3
report of ..... I—3, 4, 6

Digitized by Google

Impeachment of Andrew Johnson—Continued.
order (in House) limiting debate, and directing proceedings when articles of, are reported to House—
adopted, (yeas 106, nays 37) ..... I—3
managers elected and Senate notified ..... I—4
directed to carry articles to Senate ..... I—4
House informed that Senate is ready to receive ..... I—4
House in Committee of the Whole to attend ..... I—4
appear at bar of the Senate with articles ..... I—6
demand that the Senate take process, &c ..... I—16
articles of ..... I—6
rules of procedure on the trial of ..... I—6, 13
answer of respondent ..... I—37
replication ..... I—84
opening arguments ..... I—87, 377
evidence ..... I—147, 415
arguments ..... II—14-447
final vote ..... II—486, 487, 496, 497
opinions III

J.

Johnson, Andrew, President of the United States—
articles of impeachment ..... I—6
summons issued to ..... I—16
returned ..... I—18
called by proclamation ..... I—18
appearance entered and counsel named ..... I—19
forty days asked to prepare answer ..... I—19
answer to articles ..... I—37
oath of office, April 15, 1865 ..... I—147
suspension of Edwin M. Stanton, Secretary of War, and designation of General Grant Secretary *ad interim* communicated to Senate December 12, 1867 ..... I—148
Senate's non-concurrence in, communicated ..... I—155
removal of Edwin M. Stanton, Secretary of War, and designation of Lorenzo Thomas Secretary *ad interim*, February 21, 1868 ..... I—156, 248
Senate's denial of power to remove and appoint communicated ..... I—157, 158
appointment of Edmund Cooper Assistant Secretary of Treasury ..... I—163, 164
order that Adjutant General Thomas resume his duties ..... I—240
instructions to General Grant not to obey orders from War Department, unless, &c ..... I—240
letter to General Grant in regard to his having vacated the office of Secretary *ad interim* ..... I—241
telegram to Governor Parsons ..... I—272
message communicating report relating to amendment of the Constitution ..... I—278
reports of speech August 18, 1866, in reply to Hon. Reverdy Johnson ..... I—298, 301
at Cleveland, September 3, 1866 ..... I—325, 328, 333
at St. Louis, September 8, 1866 ..... I—340, 348
notification to Secretary of Treasury, August 14, 1867, of suspension of Mr. Stanton ..... I—364
conversation with General Emory ..... I—233, 236
with General Wallace ..... I—253, 256
with Mr. Wood ..... I—372
with Mr. Blodgett ..... I—375
with Adjutant General Thomas ..... I—417, 418, 426, 427, 428, 430, 437, 438, 439, 452, 453
with Lieutenant General Sherman ..... I—461, 481, 483
with Mr. Cox ..... I—597, 605, 609, 613
with Mr. Merrick ..... I—617, 623
with Mr. Perrin ..... I—623, 624
with Secretary Welles ..... I—664, 674, 675
tender of War Office to Lieutenant General Sherman ..... I—461, 483, 485, 517, 518, 521, 528, 529
nomination of Mr. Ewing Secretary of War, February 22, 1868 ..... I—508, 516, 537, 555, 566
instructions to test Lorenzo Thomas's right to office ..... I—605, 609, 620
acquittal on article XI ..... II—486, 487
II ..... II—496
III ..... II—497
Johnson, Reverdy, a senator from Maryland ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court. III—361, 366, 369, 390, 392, 401
orders by—
that trial proceed at the expiration of 10 days, unless for causes shown to the contrary: offered ... I—83
considered ..... I—84
that Senate commence the trial 2d of April: offered ..... I—85
that two of managers be permitted to file printed arguments, &c.: amendment offered and adopted, II—5
remarks by ..... I—18, 33, 78, 82, 83, 84, 85, 147, 154, 160, 161, 176, 206, 208, 209, 236, 237, 247, 265, 270, 298, 312, 325, 362, 365, 368, 370, 372, 397, 452, 486, 487, 495, 507, 515, 517, 518, 519, 520, 521, 522, 523, 524, 528, 529, 532, 534, 537, 562, 563, 564, 566, 568, 573, 583, 589, 590, 612, 620, 621, 626, 644, 654, 661, 669, 675, 676, 680, 692, 709, 711, 714, 716, 717, 718, 721, 722, 736, 739, 740, 741. II—5, 6, 13, 118, 166, 189, 218, 262, 281, 282, 283, 306, 389, 469, 475, 479, 483, 484, 485, 487, 490, 498.
questions by ..... I—206, 265, 507, 547, 680
opinion on the case ..... III—50
Jones, J. W. See *Testimony*.
Judgment of acquittal entered ..... II—498

K.

Karsner, George W. (See *Testimony*.)
Knapp, George. (See *Testimony*.)

L.

Lawrence, William, a representative from Ohio—
brief of authorities upon the law of impeachable crimes, by ..... I—123. III—355

Digitized by Google

Legislative business. (See *Practice.*)
Logan, John A., of Illinois, a manager ..... I—4, 17
argument by—
on application of counsel for thirty days to prepare for trial ..... I—69
final, on the case ..... II—14
remarks on the Alta Vela letter ..... II—268

M.

Managers on the part of the House elected, and Senate notified ..... I—4
directed to carry articles to Senate ..... I—4
House informed that Senate is ready to receive ..... I—4
House in Committee of the Whole to attend ..... I—4
appear at bar of Senate with articles ..... I—6
demand that the Senate take process, &c ..... I—16
McCreery, Thomas C., a senator from Kentucky ..... I—11
motion by ..... II—489
McDonald, William J. (See *Testimony.*)
McEwen, Daniel C. (See *Testimony.*)
Meigs, R. J. (See *Testimony.*)
Merrick, Richard T. (See *Testimony.*)
Moore, William G. (See *Testimony.*)
Moorhead, James K. (See *Testimony.*)
Morgan, Edwin D., a senator from New York ..... I—11
Morrill, Justin S., a senator from Vermont ..... I—11
order by—
that Senate meet on Monday next (May 11) at 11 a. m., for deliberation, and on Tuesday at 12 m. proceed to vote without debate on the several articles—each senator to be permitted to file his written opinion within two days after the vote: offered ..... II—476
agreed to ..... II—478
remarks by ..... I—390. II—249, 476, 478
opinion on the case ..... III—136
Morrill, Lot M., a senator from Maine ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court ..... III—364, 394
order by—
that Senate proceed on Monday next to take the yeas and nays on the articles without debate; any senator to have permission to file a written opinion: offered ..... II—476
remarks by ..... I—185, 442. II—470, 476, 493, 494, 495
opinion on the case ..... III—126
Morton, Oliver P., a senator from Indiana ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court ..... III—367, 387
remarks by ..... I—24, 86, 674. II—219, 485

N.

Nelson, Thomas A. R., of Tennessee, counsel ..... I—19
argument by—
on motion to fix a day for trial to proceed ..... I—28
on motion to fix the number and order of speakers on final argument ..... I—534. II—9
final, on the case ..... II—118, 141
remarks on the Alta Vela letter ..... II—144, 265, 266, 267, 268, 280, 281, 282, 283, 284, 307
Norton, Daniel S., a senator from Minnesota ..... I—11
Nye, James W., a senator from Nevada ..... I—11

O.

Oath administered to Chief Justice ..... I—11
to senators ..... I—11, 12, 17, 34
question. Whether it is competent for the President *pro tempore* of the Senate to take the, and become thereby a part of the court—[*By Mr. Hendricks*]—discussed ..... III—360
withdrawn ..... III—400
Officers, territorial and executive, list of, with their tenures ..... I—348
Opinion: order, that each senator shall be permitted to file, within two days after the vote shall have been taken, to be printed with the proceedings [*By Mr. Morrill of Vermont*] ..... II—476
agreed to ..... II—478
filed by—
Mr. Buckalew ..... III—218
Mr. Cattell ..... III—178
Mr. Davis ..... III—156
Mr. Doolittle ..... III—244
Mr. Edmunds ..... III—82
Mr. Ferry ..... III—121
Mr. Fessenden ..... III—16
Mr. Fowler ..... III—193
Mr. Frelinghuysen ..... III—208
Mr. Grimes ..... III—328
Mr. Harlan ..... III—233
Mr. Henderson ..... III—295
Mr. Hendricks ..... III—95
Mr. Howard ..... III—31
Mr. Howe ..... III—58
Mr. Johnson ..... III—50
Mr. Morrill, of Maine ..... III—126
Mr. Morrill, of Vermont ..... III—136
Mr. Patterson, of New Hampshire ..... III—309
Mr. Pomeroy ..... III—340
Mr. Sherman ..... III—3
Mr. Stewart ..... III—152

Digitized by Google

Opinion, filed by—
Mr. Sumner ..... III—247
Mr. Tipton ..... III—189
Mr. Trumbull ..... III—319
Mr. Van Winkle ..... III—147
Mr. Vickers ..... III—116
Mr. Williams ..... III—347
Mr. Wilson ..... III—214
Mr. Yates ..... III—102

P.

Patterson, James W., a senator from New Hampshire ..... I—17
opinion on the case ..... III—309
Patterson, David T., a senator from Tennessee ..... I—11
remarks by ..... I—160
Perrin, Edwin O. (See *Testimony.*)
Pomeroy, Samuel C., a senator from Kansas ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court ..... III—379, 390, 394, 401
order by—
(in Senate,) that the notice to Chief Justice to meet the Senate in the trial and request his attendance be delivered by a committee of three, &c.; agreed to ..... I—10
remarks by ..... I—10, 451. II—4, 359, 490
opinion on the case ..... III—340
Practice. (See *Rules.*)
right of counsel making motion to open and close argument thereon ..... I—77
the limitation of argument on interlocutory questions to one hour, by rule XX, has reference to the whole number of persons to speak on each side, and not to each person severally ..... I—207, 208
it is not in order to call up business transacted in legislative session ..... I—301
objections to putting question to witness by a member of the court must come from the court itself ..... I—507, 519
but after question is asked, it is competent for managers to state objections to its being answered ..... I—519
it is competent for Senate to recall any witness ..... I—518, 522
if managers desire to cross-examine they must cross-examine before dismissing witness ..... I—531
an application for an order of Senate to furnish a statement from its records can only be addressed to Senate in legislative session ..... I—589
the general rules of the Senate in its legislative session govern proceedings of the court, so far as applicable ..... I—451, 532
President. (See *Johnson, Andrew.*)
President *pro tempore* of the Senate—
question, Whether it is competent for the, to take the oath and become thereby a part of the court—[*By Mr. Hendricks*] ..... III—360
discussed by—
Mr. Anthony ..... III—385
Mr. Bayard ..... III—372
Mr. Buckalew ..... III—383, 385
Mr. Conness ..... III—367, 395
Mr. Davis ..... III—363, 366
Mr. Dixon ..... III—388, 389, 390, 391, 393, 393, 394, 395, 396
Mr. Drake ..... III—380, 389, 390, 393
Mr. Ferry ..... III—394
Mr. Fessenden ..... III—366, 367, 394, 401
Mr. Frelinghuysen ..... III—380, 385
Mr. Grimes ..... III—388, 394, 401
Mr. Hendricks ..... III—360, 364, 392, 399, 401
Mr. Howard ..... III—361, 367, 382, 383, 388, 389, 390, 392, 393, 401
Mr. Howe ..... III—380
Mr. Johnson ..... III—361, 366, 369, 390, 392, 401
Mr. Morrill, of Maine ..... III—364, 394
Mr. Morton ..... III—367, 387
Mr. Pomeroy ..... III—379, 390, 394, 401
Mr. Sherman ..... III—360, 371, 391, 392, 401
Mr. Stewart ..... III—385
Mr. Sumner ..... III—375
Mr. Thayer ..... III—381
Mr. Williams ..... III—365, 366
withdrawn ..... III—400

Q.

Question, final, order that when doors shall be closed for deliberation upon, the official reporters shall take down debates, to be reported in proceedings—[*By Mr. Edmunds.*]
offered ..... II—141
read ..... II—188, 218, 471
tabled, (yeas 28, nays 20) ..... II—474
order, that Senate proceed to vote on the several articles at twelve o'clock on day after the close of arguments—[*By Mr. Sumner.*]
offered ..... II—189
called up ..... II—474, 476
order, that the Senate meet on Monday next (May 11) at 11 a. m., for deliberation on, and on Tuesday, at 12 m., proceed to vote without debate on the several articles, &c.—[*By Mr. Morrill, of Vermont.*]
offered ..... II—476
agreed to ..... II—478
orders offered prescribing form of, by—
Mr. Buckalew ..... II—478
Mr. Conkling ..... II—478

Digitized by Google

Question, final—Continued.
orders offered prescribing form of, by—
Mr. Conness ..... II—478
Mr. Hendricks ..... II—478
Mr. Sumner ..... II—189, 219, 478
views of Chief Justice on form of putting ..... II—480
order that the views of Chief Justice be entered on the journal—[*By Mr. Buckalew.*]
offered and agreed to ..... II—480
order that, be put as proposed by presiding officer, and each senator rise and answer "Guilty" or "Not guilty" only—[*By Mr. Sumner.*]
offered and agreed to ..... II—481
order, that the standing order of the Senate that it will proceed to vote on the articles at 12 o'clock m. to-morrow be rescinded. [*By Mr. Edmunds.*]
offered May 11, 1868 ..... II—482
agreed to ..... II—483
order, that the Senate now proceed to vote upon the articles, according to the rules of the Senate—[*By Mr. Edmunds.*]
offered May 16 ..... II—485
agreed to ..... II—486
order that, shall be taken on eleventh article first, and thereafter on the other ten successively as they stand—[*By Mr. Williams.*]
agreed to, (yeas 34, nays 19) ..... II—484, 485
taken on—
Article XI: That he attempted to prevent the execution of the tenure-of-office act by unlawfully devising means to prevent Mr. Stanton from resuming the functions of his office, and to prevent the execution of the clause in the appropriation act of 1867 requiring that all orders should pass through the General of the army, and the reconstruction acts of March 5, 1867; (yeas 35, nays 19) ..... II—486, 487
order that, be now taken on remaining articles—[*By Mr. Conkling.*]
offered and rejected, (yeas 26, nays 28) ..... II—492
that the several orders heretofore adopted as to order of voting on, be rescinded—[*By Mr. Williams.*]
offered ..... II—490, 491
agreed to ..... II—495
taken on—
Article II: That he issued a letter of authority to Lorenzo Thomas to act as Secretary of War *ad interim*, with intent to violate the Constitution and the tenure-of-office act; (yeas 35, nays 19) ... II—496
taken on—
Article III: That he appointed Lorenzo Thomas to be Secretary of War *ad interim*, with intent to violate the Constitution, (yeas 35, nays 19.) ..... II—497
Questions. (See *Practice.*)

R.

Ramsey, Alexander, a senator from Minnesota ..... I—11
remarks by ..... I—276
Randall, Alexander W. (See *Testimony.*)
Replication, read and filed ..... I—84
Ross, Edmund G., a senator from Kansas ..... I—11
motion by ..... II—495
Rule VII, order amending, in respect to submitting questions of evidence, &c., to Senate—[*By Mr. Henderson.*]
offered, I—185; agreed to, (yeas 31, nays 19) ..... I—186
VII, order amending and requiring votes upon incidental questions to be without division, unless demanded, &c.—[*By Mr. Drake.*]
offered, I—230; agreed to ..... I—277
XX, construction of ..... I—207, 208
XXI, motion to amend, so as to allow such of managers or counsel as desire to be heard, to speak on final argument—[*By Manager Bingham*] ..... I—450
XXI, motion to remove limit fixed by, as to number who may participate in final argument—[*By Mr. Frelinghuysen.*]
offered ..... I—451
discussed by—
Manager Williams ..... I—491
Manager Stevens ..... I—494
Manager Boutwell ..... I—495
Mr. Stanbery ..... I—495
Manager Butler ..... I—496
Mr. Evarts ..... I—497
tabled, (yeas 38, nays 10) ..... I—498
XXIII, order amending, to subject it to operation of Rule VII—[*By Mr. Conkling.*]
offered, and agreed to ..... I—18
amendment, that the fifteen minutes allowed by, shall be for the whole deliberation on final question, and not to final question on each article—[*By Mr. Drake.*]
offered, II—474; adopted ..... II—478
Rules. (See *Practice.*)
order (in House) limiting debate and directing proceedings when articles are reported to House—[*By Mr. Washburne, of Illinois:*] adopted; (yeas 106, nays 37). ..... I—3
of procedure and practice ..... I—6, 13
of Senate sitting in legislative session, adopted for guidance of court, as far as applicable ..... I—451, 532
Rulings. (See *Evidence; Practice.*)

S.

Saulsbury, Willard, a senator from Delaware ..... I—12
Senators, oath administered to ..... I—11, 12, 17, 34
Seward, Frederick W. (See *Testimony.*)
Sheridan, James B. (See *Testimony.*)
Sherman, John, a senator from Ohio ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court ..... III—360, 371, 391, 392, 401

Digitized by Google

Sherman, John—Continued.
orders by—
that trial proceed on 6th of April: offered and discussed ..... I—25
that under the rules all questions other than of order should be submitted to Senate: offered..... I—185
that additional time allowed by amendment to Rule XXI shall not exceed three hours: offered.... I—495
that managers and counsel have leave to file written or printed arguments before oral argument commences: offered..... I—741
that managers be permitted to file printed or written arguments: amendment offered..... II—6
remarks by.....I—25, 82, 83, 154, 155, 181, 185, 264, 363, 449, 451, 494, 496, 537, 565, 568, 589, 608, 611, 673, 676, 709, 715, 716, 741. II—5, 6, 83, 84, 188, 280, 281, 359, 403, 469, 471, 473, 475, 479, 480, 487
questions by ..... I—181, 264, 568
opinion on the case ..... III—3
Sherman, William T. (See *Testimony.*)
Smith, Francis H. (See *Testimony.*)
Sprague, William, a senator from Rhode Island..... I—11
remarks by.....I—477. II—8, 493
Stanbery, Henry, of Kentucky, counsel ..... I—19
motions by—
for an allowance of forty days to prepare answer ..... I—19
denied ..... I—24
for an allowance of thirty days to prepare for trial ..... I—69
denied, (yeas 12, nays 41)..... I—82
argument by—
on application for forty days to prepare answer..... I—21
for thirty days to prepare for trial..... I—75
on admissibility—
of Adjt. Genl. Thomas's, declarations to Mr. Burleigh, February 21, 1868...I—188, 192, 193, 195, 206, 207
of President's letter to General Grant, unaccompanied with enclosures..... I—244, 245
of appointment of Edmund Cooper to be Assistant Secretary of Treasury.....I—260, 261, 262, 264
of telegrams relating to the reconstruction of Alabama..... I—270, 275
of President's declarations to Adjutant General Thomas, February 21 ..... I—421
of conversations between President and Gen'l Sherman, January 12 ...I—462, 463, 465, 468, 469, 471, 472
of question respecting department of the Atlantic..... I—481, 482
of tender of War office to General Sherman..... I—482
of President's purpose to get the question before the courts..... I—485
of question, Whether General Sherman formed and gave the President an opinion, &c...I—499, 501, 504
of affidavit and warrant of arrest of Lorenzo Thomas..... I—512, 513, 514
on motion to remove limit to number of speakers on final argument..... I—495
on right of counsel to renew examination of a witness recalled by court..... I—524
final, on the case..... II—359, 360
Stanton, Edwin M., Secretary of War—
nomination of..... I—148
confirmation of..... I—148
commission of..... I—157
suspension of, communicated to Senate..... I—148
Senate's non-concurrence in..... I—155
removal of, order for..... I—156, 248
communicated to Senate ..... I—156
Senate resolution on ..... I—157
interviews of, with Adjutant General Thomas, demanding possession..... I—164, 174, 220, 223, 232
letter of, denying General Thomas's authority..... I—420
affidavit of, for arrest of General Thomas..... I—515
Stark, Everett D. (See *Testimony.*)
Stewart, William M., a senator from Nevada..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court.....III—395
orders by—
that Manager Logan have leave to file written argument:
offered..... I—741
amended..... I—741
read ..... II—3
remarks by..... I—489, 491, 532, 561, 632, 680, 717, 740, 741. II—11
opinion on the case ..... III—152
Stevens, Thaddeus, of Pennsylvania, a manager..... I—4, 17
remarks on order relating to final argument.....I—494. II—7
argument, final, on the case..... II—219
Summons ordered ..... I—16
return of, read and verified..... I—18
Sumner, Charles, a senator from Massachusetts ..... I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court.....III—375
orders by—
that Senate proceed with trial from day to day unless otherwise ordered:
offered ..... I—85
withdrawn ..... I—86
that Chief Justice presiding has no authority to vote on any question during the trial, &c.:
offered and rejected, (yeas 22, nays 26,)..... I—185
that where the Senate were equally divided, and Chief Justice gave a casting vote, such vote was without authority under the Constitution:
offered and rejected, (yeas 21, nays 27,)..... I—187
that trial proceed without delay on account of removal of limit provided by Rule XXI:
amendment offered and accepted..... I—491
that on final argument the several managers who speak shall close:
offered..... I—497
that under rule limiting argument to two on a side, such others as choose may file arguments at any time before the argument of the closing manager:
laid over ..... I—532
amended..... I—534
indefinitely postponed, (yeas 34, nays 15,) ..... I—536

Digitized by Google

Sumner, Charles, orders by—Continued.
that all evidence offered not trivial or obviously irrelevant be received without objection, to be open to question at the bar to determine its value, and to be sifted and weighed in the final judgment:
offered....I—589
tabled, (yeas 33, nays 11)....I—590
that Senate sit from 10 a. m. to 6 p. m.:
offered....I—631
rejected, (yeas 13, nays 30)....I—633
that Senate proceed to vote on the several articles of impeachment at twelve o'clock on the day after close of arguments:
offered....II—189
called up....II—474, 476
that after removal, which follows conviction, any further judgment shall be determined by a majority of members present:
offered and laid over....II—249
that Mr. Nelson, one of counsel, having used disorderly words, has deserved the disapprobation of the Senate:
offered....II—280
tabled, (yeas 35, nays 10)....II—307
that Senate will sit from 10 a. m. to 6 p. m.:
offered and tabled, (yeas 32, nays 17)....II—308
denying permission to each senator to file written opinion, &c:
offered and rejected, (yeas 6, nays 42)....II—477
that the question be put as proposed by presiding officer, and each senator shall rise in his place and answer "Guilty" or "Not guilty" only:
offered and agreed to....II—481
rules by—
XXIII, in taking the votes of Senate on the articles, presiding officer shall call each senator by name, and upon each article propose the question of "Guilty or not guilty?" whereupon each senator shall rise in his place and answer:
proposed April 25....II—189
laid over....II—219
called up....II—478
XXIV, on a conviction by Senate it shall be the duty of presiding officer forthwith to pronounce the removal from office of the convicted person; any further judgment shall be on the order of Senate:
proposed April 25....II—189
laid over....II—219
called up....II—481
remarks by....I—24, 25, 85, 86, 154, 155, 185, 186, 187, 265, 298, 367, 370, 371, 489, 491, 496, 497, 532, 534, 536, 561, 589, 631, 632, 633, 673. II—99, 141, 188, 189, 203, 218, 219, 249, 280, 281, 307, 308, 471, 475, 477, 478, 479, 481, 490, 498
opinion on the case....III—247
on the question, Can the Chief Justice, presiding in the Senate, rule or vote....III—281

T.

Testimony for the prosecution—
William J. McDonald: service of Senate resolutions at office of President....I—158
J. W. Jones: service of Senate resolution on Adjutant General Thomas....I—159
C. E. Creecy: form of commission before and after tenure-of-office act, I—160, 161, 162; commission of Edmund Cooper, as Assistant Secretary of Treasury, I—163; date of change in form of commission, I—164; President's notification to Secretary of Treasury of Secretary Stanton's suspension, I—363, 364; notification of Secretary of Treasury to heads of bureaus, I—366.
Burt Van Horn: Adjutant General Thomas's demand for possession of War Department....I—164–170
James K. Moorhead: Adjutant General Thomas's demand for possession of War Department....I—170–174
Walter A. Burleigh: Adjutant General Thomas's account of interview with Secretary Stanton, I—174; his intentions, I—188; his declarations to clerks, I—211, 214, 215, 219, 220; means by which he intended to obtain possession, I—175, 188, 210, 211, 218, 219.
Samuel Wilkeson: Adjutant General Thomas's account of interview with Secretary Stanton....I—220
George W. Karsner: conversations with Adjutant General Thomas, I—223–230; his intentions, I—224, 227; interview with Secretary Stanton, I—231.
Thomas W. Ferry: occurrences at War Department, February 22....I—232
William H. Emory: conversations with President in reference to troops, I—233–236; Orders No. 15 and 17, I—235, 238.
George W. Wallace: conversation with President in regard to garrison at Washington and movement of troops....I—253–256
William E. Chandler: process of drawing money from Treasury Department, I—256, 265, 266; course of issuing commission to an officer confirmed by Senate, I—257; authority of Assistant Secretary of Treasury to sign warrants, I—266; the practice, I—267.
Charles A. Tinker: telegrams between Lewis E. Parsons and President relating to reconstruction in Alabama, I—268–272; President's speech, August 18, 1866, as telegraphed, I—280, 281, 289, 290.
James B. Sheridan: President's speech, August 18, 1866, in reply to Hon. Reverdy Johnson, I—281–283; manner of reporting it, I—282, 283, 291; corrections by President's secretary, I—281, 290, 291.
James O. Clephane: President's speech, August 18, 1866, in reply to Hon. Reverdy Johnson, I—283, 284; revision by President's secretary, I—284, 294; *verbatim* report rewritten for Chronicle, I—284, 285, 286.
Francis H. Smith: President's speech, August 18, 1866, I—292, 293; revision by President's secretary, I—292.
William G. Moore: corrections of report of President's speech, August 18, 1866....I—294, 297
William N. Hudson: President's speech at Cleveland, September 3, 1866, reported for Cleveland Leader, I—304–310; cries of the crowd, I—310–315.
Daniel C. McEwen: President's speech at Cleveland, September 3, 1866....I—316–318
Everett D. Stark: President's speech at Cleveland, September 3, 1866, reported for Cleveland Herald....I—318–321
L. L. Walbridge: President's speech at St. Louis, September 8, 1866....I—337–340
Joseph A. Dear: President's speech at St. Louis....I—345–348

Digitized by Google

Testimony for the prosecution—Continued.
Robert S. Chew: change in form of commissions after passage of civil-tenure act, I—351, 357; change in plate for printing forms, I—352; list of appointments of heads of departments, I—353, 360, 361; appointments of acting Secretaries of State, I—359; from whom, I—360, 361.
H. Wood: interview with President, September, 1866, I—372; President and Congress, I—373; patronage, I—373; statement to Mr. Koppel, I—373, 374, 375.
Foster Blodgett: suspension from office of postmaster at Augusta, Georgia.....I—375
Testimony for the defence—
Lorenzo Thomas: service, I—415, 432; restoration to duty as Adjutant General, I—416, 417, 433; appointment as Secretary of War *ad interim*, I—418, 433, 434, 435, 436; letter of Mr. Stanton, I—420; arrest, I—427, 441; interviews with Secretary Stanton, I—417, 418, 419, 428, 429, 437, 460; with President, I—417, 418, 426, 427, 428, 430, 437, 438, 439, 452, 453; with Mr. Burleigh, I—431, 439, 440, 442, 452; with Mr. Karsner, I—431, 432, 448, 449, 453; with Mr. Wilkeson, I—439; with B. B. Johnson, I—454, 455; use of force, I—420, 429, 430, 431, 440, 441, 442, 443, 444; testimony before House committee, I—433, 442, 449, 457, 458, 459; would obey President's orders, I—434, 435, 437, 443; address to clerks, I—450; corrections of testimony, I—452.
William T. Sherman: duties in Washington, December, 1867, I—460, 461; interviews with President, I—461, 481, 483; tender of appointment as Secretary of War *ad interim*, I—461, 483, 485, 517; President's declarations of purpose in making tender, I—485, 517, 518, 521, 528, 529; use of force, I—529, 530.
R. J. Meigs: warrant of arrest of Lorenzo Thomas, I—508, 516; docket of entries, I—517, 531.
D. W. C. Clarke: nomination of Thomas Ewing, sen., to be Secretary of War, February 22, 1868, I—537; when received, I—537, 551.
William G. Moore: nomination of Mr. Ewing to be Secretary of War, I—556; when received, I—556; and delivered, I—557.
Walter S. Cox: counsel for Adjutant General Thomas, I—595, 596; employed by President, I—597, 613; President's instructions, I—605, 609; proceedings and their purpose, I—606–609, 612–617; application for *habeas corpus*, I—606–609; preparation of *quo warranto*, I—612; making a test case, I—605, 611, 612; J. H. Bradley, I—614; discharge of Thomas, I—609, 617.
Richard T. Merrick: employment in case of General Thomas, I—617–623; report to President, I—618; President's instructions, February 22, in respect to obtaining *habeas corpus*, I—620; acts in reference thereto, I—620, 621; discharge of Thomas, I—622.
Edwin O. Perrin: interview with President, February 21 .....I—623, 624
Wm. W. Armstrong: President's speech at Cleveland .....I—634–637
Barton Able: President's speech at St. Louis.....I—637–640
George Knapp: President's speech at St. Louis .....I—640–643
Henry F. Zider: President's speech at St. Louis, I—643; corrections, I—643, 644; differences in reports, I—646–653.
Frederick W. Seward: practice in appointments of vice-consuls .....I—660, 661
Gideon Welles: date of commission, I—663, 701; movements of troops, February 21, 1868, I—663, 702, 703; conversation with President, I—664, 674, 675; removal of Mr. Stanton, I—666, 667, 674; appointment of Mr. Ewing, February 22, I—664, 702; consideration of civil-tenure act in cabinet, I—675, 693, 697, 700.
Edgar T. Welles: form of navy agent's commission, I—704; movement of troops, I—705, 706.
Alexander W. Randall: date of commission, I—707; suspension of Foster Blodgett, I—707–715; law by which he was suspended, I—711; indictment, I—712, 713, 714, 719; explanation, I—726, 727.
Thayer, John M., a senator from Nebraska.....I—11
remarks on the competency of the President *pro tempore* to sit as a member of the court.....III—381
remarks by.....I—184, 208, 489, 490, 536, 606. II—8, 472, 493
Thomas, Lorenzo—
rank and service of.....I—415, 432
restoration of, to duty as Adjutant General .....I—240, 256, 416, 417, 433
appointment of, Secretary of War *ad interim*.....I—156, 248, 418, 433, 434, 435, 436
Senate resolution on, communicated to.....I—157, 158
letter of, accepting .....I—369
demand of, for possession.....I—164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 220, 221, 222, 223, 232
conversations of—
with President.....I—417, 418, 426, 427, 428, 430, 437, 438, 439, 452, 453
with Secretary Stanton.....I—417, 418, 419, 428, 429, 437, 460
with Mr. Burleigh.....I—174, 220, 431, 439, 440, 442, 452
with Mr. Wilkeson .....I—223, 439
with Mr. Karsner.....I—223, 431, 432, 448, 449, 453
with Mr. B. B. Johnson .....I—454, 455
declarations of, to clerks of the War Office.....I—211, 214, 215, 219, 220, 450
intentions of, as to obtaining possession.....I—175, 188, 210, 211, 218, 219, 431, 440, 441, 442, 443, 444
arrest of, and proceedings thereon.....I—427, 441, 515
Tickets, order, (in Senate,) that during the trial, no persons besides those who have the privilege of the floor, &c., shall be admitted except upon, issued by the Sergeant-at-arms.—[*By Mr. Anthony.*]
agreed to..... I—10
Tinker, Charles A. (See *Testimony.*)
Tipton, Thomas W., a senator from Nebraska ..... I—11
remarks by.....I—297. II—187, 282, 483
opinion on the case .....III—189
Trial, motion to fix a day for, to proceed—
discussed by—
Manager Butler ..... I—25
Mr. Nelson ..... I—28
Manager Bingham.....I—32, 33
order that, unless otherwise ordered, the, proceed immediately after replication filed—[*By Mr. Conkling.*]
offered ..... I—31
agreed to, (yeas 40, nays 10) ..... I—33
application of counsel for thirty days to prepare for ..... I—69
discussed by—
Mr. Evarts.....I—68, 71
Manager Bingham.....I—69, 77, 78
Manager Logan ..... I—69
Manager Wilson..... I—73
Mr. Stanbery ..... I—75

Digitized by Google

Trial, motion to fix a day for, to proceed—Continued.
discussed by—
Manager Boutwell ..... I—78
Manager Butler ..... I—81
denied, (yeas 12, nays 41) ..... I—82
orders offered to fix time for, to proceed by—
Mr. Edmunds ..... I—24
Manager Bingham ..... I—25
Mr. Sherman ..... I—25
Mr. Conkling ..... I—31, 32, 85
Mr. Johnson ..... I—83, 84, 85
Mr. Hendricks .....
Mr. Sumner ..... I—85
application of counsel for reasonable time, after replication filed, to prepare for ..... I—63
order fixing the 30th of March for commencement of—[*By Mr. Conkling.*]
offered and agreed to, (yeas 28, nays 24) ..... I—85
Trumbull, Lyman, a senator from Illinois ..... I—11
orders by—
that respondent file answer on or before 23d March: agreed to ..... I—35
that as many of managers as desire be permitted to file arguments or address Senate orally; but the conclusion of oral argument shall be by one manager, as provided by rule XXI:
offered ..... II—11
adopted, (yeas 28, nays 22) ..... II—14
remarks by ..... I—81, 160, 187, 188, 208, 209, 297, 451, 489, 528, 547, 631, 632, 673
II—7, 11, 12, 281, 308, 469, 470, 473, 475, 476, 488, 490, 492, 493, 495
opinion on the case ..... III—319

V.

Van Horn, Burt. (See *Testimony.*)
Van Winkle, P. G., a senator from West Virginia ..... I—11
opinion on the case ..... III—147
Vickers, George, a senator from Maryland ..... I—17
orders by—
that any two of managers, except those who open and close, and who have not addressed Senate, may file written arguments before adjournment or make oral addresses after the opening by one of managers and first reply of counsel, and that other two of counsel who have not spoken may reply, but alternating with said two managers, leaving closing argument for President and managers' final reply under original rule: offered, II—3; disagreed to, (yeas 20, nays 26,) II—4.
that one of managers may file printed argument before adjournment, and that after oral opening by a manager and reply by one of counsel another counsel may file written or make oral address, to be followed by closing speech of one of counsel and final reply of a manager: offered ..... II—4
remarks by ..... II—3, 4
opinion on the case ..... III—116
Votes. (See *Chief Justice; Evidence; Question; Rules.*)

W.

Wade, Benjamin F., a senator from Ohio ..... I—12
(See *President pro tempore*)
Walbridge, L. L. (See *Testimony.*)
Wallace, George W. (See *Testimony.*)
Walles, Edgar T. (See *Testimony.*)
Welles, Gideon. (See *Testimony.*)
Wilkeson, Samuel. (See *Testimony.*)
Willey, Waitman T., a senator from West Virginia ..... I—12
Williams, George H., a senator from Oregon ..... I—12
remarks on the competency of the President *pro tempore* to sit as a member of the court ..... III—365, 366
orders by—
that consideration of respondent's application for time be postponed until managers have submitted their evidence: offered ..... I—85
not agreed to, (yeas 9, nays 42) ..... I—86
that no senator shall speak more than once, nor to exceed fifteen minutes during deliberations on final questions: offered ..... II—218
postponed ..... II—219
tabled, (yeas 28, nays 20) ..... II—474
that the question shall be taken on the eleventh article first, and thereafter on the other ten successively as they stand: agreed to, (yeas 34, nays 19) ..... II—484, 485
that the several orders heretofore adopted as to the order of voting upon the articles be rescinded: offered ..... II—490
agreed to ..... II—495
remarks by ..I—85, 86, 187, 267, 497, 522, 524, 528, 634, 692, 706. II—218, 472, 479, 484, 487, 490, 492, 495, 496, 497
questions by ..... I—522, 692, 706
opinion on the case ..... III—347
Williams, Thomas, of Pennsylvania, a manager ..... I—4, 17
argument, final, on the case ..... II—230, 249
remarks on motion relating to the number of speakers on final argument ..... I—491. II—6
Wilson, James F., of Iowa, a manager ..... I—4, 17
argument by—
on application of counsel for forty days to prepare answer ..... I—20
for thirty days to prepare for trial ..... I—73
on admissibility—
of President's letter to General Grant, unaccompanied with enclosures ..... I—244, 246
of President's conversation with General Sherman ..... I—478, 479
of employment of counsel by President to get up test case ..... I—602
of President's declarations to Mr. Perrin ..... I—626
of advice to President by cabinet touching constitutionality of tenure-of-office act ..... I—681

Digitized by Google

Wilson, Henry, a senator from Massachusetts ..... I—12
remarks by ..... I—25, 31, 32, 86, 181, 184, 740. II—6, 141, 434, 473
opinion on the case ..... III—214
Witness. (See *Practice.*)
question, Whether counsel can renew examination of a, recalled by court—[*By Mr. Williams*] ..... I—522
discussed by—
Mr. Evarts ..... I—522, 524, 526
Manager Butler ..... I—523
Manager Bingham ..... I—524, 525, 527
Mr. Stanbery ..... I—524
withdrawn ..... I—528
Witnesses for the prosecution. (For analysis of testimony see *Testimony.*)
Blodgett, Foster, suspension from office ..... I—375
Burleigh, Walter A., conversations with Thomas ..... I—174, 188
Chandler, William E., drawing money from treasury ..... I—456
Chew, Robert S., form of commissions ..... I—351, 357
Clephane, James O., President's speech, August 18, 1866 ..... I—283, 294
Creecy, Charles E., form of commission ..... I—160, 363
Dear, Joseph A., President's St. Louis speech ..... I—345
Emory, William H., conversations with President; troops ..... I—233
Ferry, Thomas W., demand of War Office ..... I—232
Hudson, William N., President's Cleveland speech ..... I—304
Jones, J. W., service of Senate resolution ..... I—159
Karsner, George W., conversations with Thomas ..... I—223, 231
McDonald, William J., service of Senate resolutions ..... I—158
McEwen, Daniel C., President's Cleveland speech ..... I—316
Moore, William G., corrections President's speech, August 18, 1866 ..... I—294
Moorhead, James K., demand of War Office ..... I—170
Sheridan, James B., President's speech, August 18, 1866 ..... I—281, 290
Smith, Francis H., President's speech, August 18, 1866 ..... I—292
Stark, Everett D., President's Cleveland speech ..... I—318
Tinker, Charles A., telegrams ..... I—268, 280, 289
Van Horn, Burt, demand of War Office ..... I—164
Walbridge, L. L., President's St. Louis speech ..... I—337
Wallace, George W., conversations with President; troops ..... I—253
Wilkeson, Samuel, conversations with Thomas ..... I—220
Wood, H., interview with President ..... I—372
Witnesses for the defence—
Able, Barton, President's St. Louis speech ..... I—637
Armstrong, William W., President's Cleveland speech ..... I—634
Clarke, D. W. C., nomination of Mr. Ewing ..... I—537, 555
Cox, Walter S., test case ..... I—595
Knapp, George, President's St. Louis speech ..... I—640
Meigs, R. J., arrest of Thomas ..... I—508, 534
Merrick, Richard T., case of Thomas; *habeas corpus* ..... I—617
Moore, William G., nomination of Mr. Ewing ..... I—556
Perrin, Edwin O., conversations with President ..... I—623
Randall, Alexander W., Foster Blodgett's case ..... I—707, 719
Seward, Frederick W., practice in appointments ..... I—660
Sherman, William T., tender of War Office ..... I—469, 498, 517
Thomas, Lorenzo, appointment; acts; conversations ..... I—415, 452
Welles, Edgar T., form of commission; troops ..... I—704
Welles, Gideon, troops; cabinet counsels ..... I—663
Zider, Henry F., President's St. Louis speech ..... I—643

Y.

Yates, Richard, senator from Illinois ..... I—12
remarks by ..... I—610, 718, 739. II—3, 12, 13, 140, 266, 479
order by—
that four of managers and counsel be permitted to make printed, written, or oral arguments, the manager to have opening and closing, subject to Rule XXI; offered ..... II—12
disagreed to, (yeas, 18, nays 31) ..... II—13
opinion on the case ..... III—102
Yeas and nays on—
adjournment ..... I—276, 298, 390, 489, 490
adjournment over ..... I—336, 371. II—471, 488, 489, 494, 495
admissibility of Adjutant General Thomas's declarations to Walter A. Burleigh, (yeas 39, nays 11) ..... I—209
to clerks of War Department, (yeas 28, nays 22) ..... I—214
of President's letter to General Grant, without enclosures, (yeas 29, nays 20) ..... I—247
of testimony relating to appointment of Edmund Cooper, (yeas 22, nays 27) ..... I—268
of telegrams between President and Lewis E. Parsons, (yeas 27, nays 17) ..... I—276
of Leader's report of President's speech at Cleveland, (yeas 35, nays 11) ..... I—325
of President's declarations to Adjutant General Thomas, February 21, (yeas 42, nays 10) ..... I—426
of President's conversation with General Sherman, (yeas 23, nays 28) ..... I—481
in regard to tender of War Office, (yeas 23, nays 29) ..... I—484
of President's declarations to General Sherman—
of purpose to get case before the courts, (yeas 7, nays 44) ..... I—487
of purpose in tendering him the War Office, (yeas 25, nays 27) ..... I—488
of Whether General Sherman gave President an opinion as to advisability of a change in the War Office, (yeas 15, nays 35) ..... I—507
of advice by General Sherman to President to appoint, &c., (yeas 18, nays 32) ..... I—508
of affidavit and warrant of arrest of Lorenzo Thomas, (yeas 34, nays 17) ..... I—515
of Whether President stated to General Sherman his purpose in tendering him the office of Secretary of War *ad interim*, (yeas 26, nays 22) ..... I—518
of President's declaration of purpose to General Sherman in tendering him the office of Secretary of War *ad interim*, (yeas 26, nays 25) ..... I—521
of extracts from records of Navy Department, (yeas 36, nays 15) ..... I—568

Digitized by Google

Yeas and nays on admissibility—
of employment of counsel by President to get up test case, (yeas 29, nays 21) ..... I—605
of acts by counsel toward getting out *habeas corpus* in the case of Thomas, (yeas 27, nays 23) ..... I—609
of acts done subsequently to test Mr. Stanton's right, &c., (yeas 27, nays 23) ..... I—612
of President's declarations to Mr. Perrin, February 21, (yeas 9, nays 37) ..... I—628
to Secretary Welles, February 21, (yeas 26, nays 23) ..... I—674
of advice to President by cabinet as to constitutionality of tenure-of-office act, (yeas 20, nays 29) ..... I—693
of advice as to construction of tenure-of-office act, (yeas 22, nays 26) ..... I—697
of cabinet consultations in regard to obtaining a judicial decision, &c., (yeas 19, nays 30) ..... I—700
in regard to use of force, (yeas 18, nays 26) ..... I—701
of opinions given to President by cabinet as to scope of tenure-of-office act, (yeas 20, nays 26) ..... I—716
of nominations of Lieutenant General Sherman and Major General Thomas to be generals by brevet, (yeas 14, nays 35) ..... I—738
appeals from decisions of Chief Justice ..... II—488. III—394
application of counsel for thirty days to prepare for trial, (yeas 12, nays 41) ..... I—82
argument, rule prescribing order of ..... II—4, 5, 8, 12, 13, 14
censure of Mr. Nelson, tabling order of, (yeas 32, nays 17) ..... II—307
Chief Justice, authority of, to rule questions of evidence ..... I—186
authority of, to vote ..... I—185
consultation, motion to retire for ..... I—85, 185
court of impeachment, unconstitutionality of, (yeas 2, nays 49) ..... I—36
impeachment of Andrew Johnson, resolution (in House) for the, (yeas 126, nays 47) ..... I—2
resolution (in House) to prepare articles of, (yeas 126, nays 42) ..... I—2, 3
rule (in House) limiting debate, when articles of, are reported, (yeas 106, nays 37) ..... I—3
order for trial to proceed forthwith upon filing replication, (yeas 25, nays 26) ..... I—25
immediately after replication filed, (yeas 40, nays 10) ..... I—33
for respondent to file answer before 20th March, (yeas 28, nays 20; and yeas 23, nays 27) ..... I—35
in respect to unconstitutionality of court of impeachment, (yeas 2, nays 49) ..... I—36
postponing application for thirty days to prepare for trial, (yeas 25, nays 28; and yeas 9, nays 42) ..... I—81, 86
directing trial to commence 30th March, (yeas 28, nays 24) ..... I—85
denying authority of Chief Justice to vote, (yeas 22, nays 26) ..... I—185
denying authority of Chief Justice to give casting vote, (yeas 22, nays 27) ..... I—187
denying privilege of Chief Justice to rule questions of law, (yeas 20, nays 30) ..... I—186
directing questions to be submitted to Senate, on request, (yeas 31, nays 19) ..... I—86
mode of procedure on final argument ..... I—498, 535, 536. II—4, 5, 8, 12, 13, 14
fixing hour of meeting ..... I—536, 633. II—141, 308
proposing to receive all evidence, not trivial, without objection ..... I—590
for reporting deliberations on final question ..... II—188, 474
fixing day for final vote ..... II—476, 477
for filing opinions ..... II—477
prescribing form of final question ..... II—478, 479
directing vote to be taken on eleventh article first, (yeas 34, nays 19) ..... II—484, 485
question, final, of "Guilty" or "Not guilty"—
on Article XI, (yeas 35, nays 19) ..... II—486, 487
II, (yeas 35, nays 19) ..... II—496
III, (yeas 35, nays 19) ..... II—497

Z.

Zider, Henry F. (See *Testimony.*)

Digitized by Google

IMPEACHMENT OF THE PRESIDENT.

WEDNESDAY, *April* 22, 1868.

The Chief Justice of the United States took the chair.

The usual proclamation having been made by the Sergeant-at-arms,

The managers of the impeachment on the part of the House of Representatives and the counsel for the respondent, except Mr. Stanbery, appeared and took the seats assigned to them respectively.

The members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

The CHIEF JUSTICE. The Secretary will read the minutes of Monday's proceedings.

Mr. EDMUNDS. Mr. President, I move that the reading of the journal be dispensed with.

The CHIEF JUSTICE. Unless there be some objection it will be so ordered. The Chair hears no objection. It is so ordered. Senators, the business under consideration when the Senate adjourned on Monday was an order offered by the senator from Nevada, [Mr. Stewart,] which the clerk will read.

The chief clerk read as follows:

Ordered, That the managers on the part of the House of Representatives and the counsel of the respondent have leave to file written or printed arguments before the oral argument commences.

Mr. VICKERS. Mr. President, I beg leave to offer this as a substitute.

The CHIEF JUSTICE. The Secretary will read the substitute.

The CHIEF CLERK. It is proposed to strike out all of the proposed order, and insert in lieu thereof:

As the counsel for the President have signified to the Senate, sitting as a court for the trial of the impeachment, that they did not desire to file written or printed arguments, but preferred to argue orally, if allowed to do so: Therefore,

Resolved That any two of the managers other than those who under the present rule are to open and close the discussion, and who have not already addressed the Senate, be permitted to file written arguments at or before the adjournment of to-day, or to make oral addresses after the opening by one of the managers and the first reply of the President's counsel, and that other two of the counsel for the President who have not spoken may have the privilege of reply, but alternating with the said two managers, leaving the closing argument for the President, and the managers' final reply to be made under the original rule.

Mr. CURTIS. Mr. Chief Justice, it may have some bearing, possibly, on the vote which is to be taken on this proposition if I were to state what I am now authorized to state, that the extent of Mr. Stanbery's indisposition is such that it will be impracticable for him to take any further part in this trial.

The CHIEF JUSTICE. Senators, you who agree to the amendment proposed by way of substitute by the senator from Maryland will say aye.

Mr. CONNESS called for the yeas and nays, and they were ordered.

Mr. YATES. I ask for the reading of the amendment.

The CHIEF JUSTICE. The Secretary will read the original proposition, and also the substitute.

Digitized by Google

The chief clerk read the order proposed by Mr. Stewart and the amendment of Mr. Vickers.

The question on the amendment being taken by yeas and nays, resulted—yeas, 26; nays, 20; as follows:

YEAS—Messrs. Buckalew, Cragin, Davis, Doolittle, Edmunds, Fessenden, Fowler, Frelinghuysen, Grimes, Hendricks, Johnson, McCreery, Morrill of Maine, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Saulsbury, Sprague, Tipton, Trumbull, Van Winkle, Vickers, Willey, Wilson, and Yates—26.

NAYS—Messrs. Cameron, Cattell, Chandler, Conness, Corbett, Drake, Ferry, Henderson, Howard, Howe, Morgan, Morrill of Vermort, Pomeroy, Ramsey, Ross, Sherman, Stewart, Sumner, Thayer, and Williams—20.

NOT VOTING—Messrs. Anthony, Bayard, Cole, Conkling, Dixon, Harlan, Nye, and Wade—8.

Mr. POMEROY. The senator from California [Mr. Cole] who sits by my side has been called suddenly to leave the city on account of a matter of deep interest to his family. He wished me to say this to the Senate in explanation of his absence.

So the amendment was agreed to.

The CHIEF JUSTICE. The question recurs on the order as amended.

Mr. CONNESS, called for the yeas and nays, and they were ordered; and being taken, resulted—yeas, 20; nays, 26; as follows:

YEAS—Messrs. Buckalew, Cragin, Davis, Doolittle, Fowler, Hendricks, Johnson, McCreery, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Saulsbury, Sumner, Tipton, Trumbull, Vickers, Willey, Wilson, and Yates—20.

NAYS—Messrs. Cameron, Cattell, Chandler, Conness, Corbett, Drake, Edmunds, Ferry, Fessenden, Frelinghuysen, Grimes, Henderson, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Thayer, Van Winkle, and Williams—26.

NOT VOTING—Messrs. Anthony, Bayard, Cole, Conkling, Dixon, Harlan, Nye, and Wade—8.

So the amendment was disagreed to.

Mr. VICKERS. Mr. President, I send an order to the Chair.

Mr. Manager STEVENS. Mr. Chief Justice, I desire to make an inquiry; and that is, whether there is any impropriety in any manager's publishing a short argument after this vote. After the motion made here on Monday some few of us, I among the rest, commenced to write out a short argument. I expect to finish it to-night, and, if the first vote had passed, I meant to file it. I do not know that there is any impropriety now in printing it, except that it will not go into the proceedings. I would not like to do anything which would be improper, and I inquire whether there would be any impropriety?

Mr. FERRY. Mr. President, I inquire whether it would be in order to move the original order upon which we have taken no vote, introduced, I think, by the senator from Massachusetts, [Mr. Sumner.]

The CHIEF JUSTICE. It would not. As the Chief Justice understands, the matter is finally disposed of. A proposition has been offered by the senator from Maryland, [Mr. Vickers,] which will be read for information:

The chief clerk read the order proposed by Mr. Vickers, as follows:

That one of the managers on the part of the House be permitted to file his printed argument before the adjournment of to-day, and that after an oral opening by a manager and the reply of one of the President's counsel, another of the President's counsel shall have the privilege of filing a written or of making an oral address, to be followed by the closing speech of one of the President's counsel and the final reply of a manager, under the existing rule.

The CHIEF JUSTICE. This order is in the nature of an amendment of the rules, and cannot be considered now unless by unanimous consent.

Mr. CONNESS. That was offered, I believe, two days since, if I am not mistaken, by the senator from Nevada.

The CHIEF JUSTICE. It has just been offered by the senator from Maryland. If there is no objection it will be now considered.

Digitized by Google

Mr. CONNESS. I offer a substitute for it.

The CHIEF JUSTICE. It is before the Senate for consideration, and the senator from California proposes a substitute.

Mr. SHERMAN. I should like to have it read again. It was not heard.

The CHIEF JUSTICE. In a moment. The Secretary will read the order proposed by the senator from Maryland, and also the substitute proposed by the senator from California.

The CHIEF CLERK. The order as proposed by the senator from Maryland is:

Ordered, That one of the managers on the part of the House be permitted to file his printed argument before the adjournment of to-day, and that after an oral opening by a manager, and the reply of one of the President's counsel, another of the President's counsel shall have the privilege of filing a written or of making an oral address, to be followed by the closing speech of one of the President's counsel, and the final reply of a manager under the existing rule.

The senator from California proposes to amend by striking out all after the word "ordered," and inserting:

That such of the managers and counsel for the President as may choose to do so have leave to file arguments before Friday, April 24.

The CHIEF JUSTICE. The question is on the amendment proposed by way of substitute.

Mr. CONNESS called for the yeas and nays, and they were ordered.

Mr. BUCKALEW. I would move to lay the resolution and amendment on the table; but I desire to have the order and amendment read again.

The CHIEF JUSTICE. The order and proposed amendment will be read again.

The chief clerk read the order and the amendment.

Mr. CONNESS. Mr. President, I wish to modify my amendment so as to read "on or before Friday, April 24."

The CHIEF JUSTICE. That modification will be made if there be no objection. The question is on the motion of the senator from Pennsylvania, [Mr. Buckalew,] to lay on the table the proposition and pending amendment.

The motion was not agreed to.

The CHIEF JUSTICE. The question recurs on the amendment proposed by the senator from California. Upon that question the yeas and nays have been ordered.

The question being taken by yeas and nays, resulted—yeas, 24; nays, 25; as follows:

YEAS—Messrs. Cameron, Cattell, Chandler, Conkling, Conness, Corbett, Cragin, Drake, Ferry, Henderson, Howard, Morrill of Vermont, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Stewart, Sumner, Thayer, Tipton, Willey, Williams, Wilson, and Yates—24.

NAYS—Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Doolittle, Edmunds, Fessenden, Fowler, Frelinghuysen, Grimes, Hendricks, Howe, Johnson, McCreery, Morgan, Morton, Norton, Patterson of Tennessee, Ross, Saulsbury, Sprague, Trumbull, Van Winkle, and Vickers—25.

NOT VOTING—Messrs. Cole, Harlan, Morrill of Maine, Nye, and Wade—5.

So the amendment was not agreed to.

The CHIEF JUSTICE. The question recurs on the order proposed by the senator from Maryland, [Mr. Vickers.]

Mr. JOHNSON. I move to amend the order by inserting "two" instead of "one" before the words "of the managers," at the beginning of the order.

Mr. SHERMAN. Say "all."

Mr. JOHNSON. No; I will not say all; that would be objectionable.

The CHIEF JUSTICE. The question is on the amendment of the senator from Maryland, [Mr. Johnson,] to strike out "one" and insert "two."

The question being put, the Chief Justice declared that the amendment appeared to be agreed to.

Mr. CONKLING called for a division.

Mr. HOWARD. I ask how the order will read if amended?

Digitized by Google

The CHIEF JUSTICE. It is proposed to strike out "one" in the first line and insert "two," so as to read:

That two of the managers on the part of the House be permitted to file, &c.

Mr. CONKLING. I beg to withdraw the call for a division; I made it under a misapprehension of the amendment.

The CHIEF JUSTICE. The Chief Justice announced the vote as agreed to. The amendment, then, stands as agreed to,

Mr. CONNESS. What is the state of the question now, the amendment adopted?

The CHIEF JUSTICE. The amendment is adopted. The question is on the order as amended.

Mr. Manager WILLIAMS. Mr. President and Senators, I beg leave to suggest, as I do very respectfully, that the effect of this order as it now stands, requiring that any argument which may be presented shall be in print to-day, will be to leave the matter substantially as it was before, because there is but one of the managers prepared, as I believe is well understood. Although three of them would like to put in arguments, there is but one of them who is so prepared just now; that is to say, whose argument is in print. So that, in this shape, it would be keeping the word of promise to the ear and breaking it to the hope.

Mr. JOHNSON. What time would the manager like?

Mr. Manager WILLIAMS. If you would say "written" instead of "printed," it would be satisfactory.

Mr. SHERMAN. I move that the order be so amended that "the managers shall have leave to file written or printed arguments."

The CHIEF JUSTICE. It is moved to strike out the word "two"——

Mr. SHERMAN. No, sir.

The CHIEF JUSTICE. The Chief Justice does not understand the amendment.

Mr. SHERMAN. Will the Secretary read the first clause, and I will submit an amendment.

The CHIEF JUSTICE. The Secretary will read the first clause.

The chief clerk read as follows:

Ordered, That two of the managers on the part of the House be permitted to file their printed argument.

Mr. SHERMAN. I move that the language be, "The managers on the part of the House be permitted to file printed or written arguments."

Mr. FESSENDEN. That cannot be done without reconsidering the vote by which we inserted the word "two."

The CHIEF JUSTICE. A motion to strike out the word "two" and insert anything else will not be in order; but a motion to add the words "or written" will be in order.

Mr. SHERMAN. I will then move to reconsider the vote adopting the amendment of the senator from Maryland, [Mr. Johnson,] inserting the word "two."

The CHIEF JUSTICE. The senator from Ohio moves to reconsider the vote by which the word "one" was stricken out and "two" was inserted.

The motion was not agreed to.

The CHIEF JUSTICE. The question recurs on the amendment to insert after the word "printed" the words "or written."

Mr. GRIMES. I wish to have the order reported, so as to know when these written arguments are to be filed. ["To-day."] Then I ask unanimous consent to inquire whether or not it is expected that the counsel for the President will examine these written arguments to-day and be able to make a reply to them to-morrow morning?

The CHIEF JUSTICE. The question is upon adding after the word "printed" the words "or written."

The amendment was agreed to.

Mr. WILSON. I ask that the order be read, as modified.

Digitized by Google

The chief clerk read as follows:

Ordered, That two of the managers on the part of the House be permitted to file their printed or written arguments before the adjournment of to-day, and that after an oral argument by one manager and the reply of one of the President's counsel, another of the President's counsel shall have the privilege of filing a written or making an oral address, to be followed by the closing speech of one of the President's counsel and the final reply of a manager under the existing rule.

Mr. CORBETT. Mr. President, I move to insert in place of the word "another" the word "two," so as to make it the same on the part of the President's counsel as on the part of the managers.

The CHIEF JUSTICE. The Clerk will read the order as it stands now, and as it will be if amended as proposed.

Mr. FOWLER. Mr. Chief Justice, the noise is so great in the hall that we cannot hear.

The CHIEF JUSTICE. Conversation in the Senate chamber must be suspended.

Mr. FOWLER. Particularly in the galleries.

The CHIEF JUSTICE. Conversation in the Senate chamber must be suspended, including the galleries.

The CHIEF CLERK. It is proposed to strike out the word "another" before the words "of the President's counsel," and to insert "two;" so that the order will read:

Ordered, That two of the managers on the part of the House be permitted to file their printed or written arguments before the adjournment of to day, and that after an oral opening by a manager and the reply of one of the President's counsel, two of the President's counsel shall have the privilege of filing a written or of making an oral address, to be followed by the closing speech of one of the President's counsel and the final reply of a manager under the existing rule.

Mr. EVARTS. Mr. Chief Justice and Senators, if you will allow me to say one word on this question, as the rule now stands two of the President's counsel are permitted to make oral arguments. By the amendment, without the modification of inserting "two" instead of "another," we understand that three of the President's counsel will be enabled to make oral arguments to the Senate. That is as many as, under any circumstances, would wish or be able to do so.

Mr. Manager STEVENS. Mr. Chief Justice, this would embarrass the managers among themselves very much. Would it not do to say that "the managers and the counsel for the President may file written or printed arguments between this and the meeting of the court to-morrow?" That would disembarrass us of all our difficulties, and I cannot perceive its inconvenience.

Mr. BAYARD. Mr. Chief Justice, I move to lay the resolution on the table, and I ask for the yeas and nays.

Mr. NELSON rose.

Mr. BAYARD. I withdraw the motion.

Mr. FESSENDEN. Mr. President, I ask if the order was not adopted.

The CHIEF JUSTICE. It has not been.

Mr. FESSENDEN. I understood it to be adopted.

The CHIEF JUSTICE. It has not yet been adopted. An amendment was adopted, but the vote has not been taken on the order itself.

Mr. TRUMBULL. Mr. President, I should like to inquire what the question before the Senate is prior to the motion to lay on the table?

The CHIEF JUSTICE. The motion to lay on the table is withdrawn.

Mr. TRUMBULL. What is the motion pending?

The CHIEF JUSTICE. The motion pending is to strike out the word "another" and insert the word "two."

Mr. TRUMBULL. I would ask the unanimous consent of the Senate to appeal to the senator from Oregon to withdraw that amendment. The counsel do not ask it.

Digitized by Google

Mr. CORBETT. Mr. President, as the order is satisfactory to the President's counsel as it now stands without the amendment I withdraw the amendment.

The CHIEF JUSTICE. The question is on adopting the order. The clerk will read it as it now stands.

The chief clerk read as follows:

Ordered, That two of the managers on the part of the House be permitted to file their printed or written arguments before the adjournment of to-day, and that after an oral opening by a manager and the reply of one of the President's counsel, another of the President's counsel shall have the privilege of filing a written or of making an oral address, to be followed by the closing speech of one of the President's counsel and the final reply by a manager under the existing rule.

Mr. CONNESS. I ask for the reading again of the first part of the order.

The chief clerk read the order.

Mr. CONNESS. That, Mr. President, I desire to suggest——

The CHIEF JUSTICE. The senator from California can speak by unanimous consent.

Mr. CONNESS. I will not ask consent, nor speak. I move, at the instance of one of the managers, to amend so that it will read "before to-morrow noon," that that length of time be given to file either written or printed arguments, as they are not ready to-day.

Mr. GRIMES. How can the other side reply to-morrow?

Mr. HENDERSON. I desire to offer a substitute.

The CHIEF JUSTICE. The first question is on the amendment proposed by the senator from California, [Mr. Conness.]

The amendment was agreed to.

The CHIEF JUSTICE. The question now is on the substitute proposed by the senator from Missouri, [Mr. Henderson.] The clerk will read it.

The chief clerk read as follows:

Strike out all after the word "ordered," in the original proposition, and insert:

That all the managers not delivering oral arguments may be permitted to file written arguments at any time before the 24th instant, and the counsel for the President not making oral arguments may file written arguments at any time before Tuesday, the 28th instant.

Mr. HENDERSON called for the yeas and nays on the amendment, and they were ordered.

Mr. THAYER. I move to lay the whole subject on the table.

Mr. SPRAGUE called for the yeas and nays, and they were ordered; and being taken, resulted—yeas, 13; nays, 37; as follows:

YEAS—Messrs. Buckalew, Conkling, Dixon, Doolittle, Edmunds, Grimes, Henderson, McCreery, Norton, Ross, Sprague, Thayer, and Williams—13.

NAYS—Messrs. Anthony, Cameron, Cattell, Chandler, Conness, Corbett, Cragin, Davis, Drake, Ferry, Fessenden, Fowler, Frelinghuysen, Harlan, Hendricks, Howard, Howe, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ramsey, Saulsbury, Sherman, Stewart, Sumner, Tipton, Trumbull, Van Winkle, Vickers, Willey, Wilson, and Yates—37.

NOT VOTING—Messrs. Bayard, Cole, Nye, and Wade—4.

So the motion to lay on the table was not agreed to.

The CHIEF JUSTICE. The question is on the amendment proposed by the senator from Missouri to strike out all after the word "ordered," and to insert what will be read by the Secretary.

Mr. HENDERSON. Before it is read I desire to modify it so as to make it read "Monday, the 27th," instead of "Tuesday, the 28th."

The CHIEF JUSTICE. The Secretary will read the amendment, as modified.

The chief clerk read as follows:

Strike out all after the word "ordered," and insert:

That all the managers not delivering oral arguments may be permitted to file written arguments at any time before the 24th instant, and the counsel for the President not making oral arguments may file written arguments at any time before Monday, the 27th instant.

Mr. HENDERSON. I will say "before 11 o'clock on Monday, the 27th instant," so that they will be in at the time of meeting.

Digitized by Google

Mr. DOOLITTLE. Mr. Chief Justice, I desire to inquire of the Chief Justice whether under that rule all the managers would not be permitted to deliver oral arguments?

Mr. HENDERSON. It does not change the present rule.

The CHIEF JUSTICE. The Secretary will read the order proposed.

Mr. EVARTS. Mr. Chief Justice and Senators, as we understand the order now proposed, it would not enlarge the privilege of the President's counsel in addressing the court. Any liberality that should be shown by the Senate, so far as it could be availed of by the President's counsel, under the peculiar circumstances in which they are placed, would probably need to include an opportunity on their part to make oral addresses.

Mr. NELSON. Mr. Chief Justice and Senators, I have felt, and still feel, an almost irresistible repugnance to saying anything to the Senate upon this subject. In the first place, in the view which I entertained of the Constitution and laws of our country, I regard it as a matter of right in the President of the United States to appear by counsel. I suppose, following the analogies of courts of justice, that the Senate, sitting as a court, have the right to regulate the number of counsel, and to confine it within reasonable limits. Inasmuch as the Senate had indicated, by a rule which was adopted before the commencement of the trial, the number of persons who were to address the Senate in the progress of the trial, I felt reluctant to ask that any alteration of that rule should be made in behalf of the President's counsel, for the very simple reason that it has never been to me a source of satisfaction to attempt to address an unwilling audience, and much less would it be a source of gratification for me to attempt to address the Senate when they had indicated by a rule that they were unwilling to hear further argument. On a former occasion I stated to the Senate that, intending on our part faithfully to adhere to the rule which you had prescribed for the conduct and management of the trial, two of the President's counsel had determined not to address the Senate; that three others of the President's counsel had assumed, with our consent, the management and direction of the case, and that in our arrangement it was left to them to make the argument before the Senate. As an application was made on the side of the managers to enlarge the number, I thought that it would not be improper on our part to ask to be permitted to appear for the cause and to argue it. Since I made a few brief observations to the Senate the other day, Mr. Stanbery, upon whom we relied to make the leading argument in behalf of the President, has been confined by sickness. It is uncertain whether he will be able to address the Senate at all; the probabilities at present are that he will not; and even if he should make the effort, the chances are that he will be unable to make that argument to the Senate which he had intended to make.

Under these circumstances, I desire to say to the Senate that I would like to be permitted to address the Senate in behalf of the President. Indeed, I desire that the rule shall be so enlarged as to give all the President's counsel the privilege of addressing the Senate, either orally or in writing, as we may find convenient to do. I have stated that, owing to the circumstances indicated, we have not prepared written arguments; and it is too late now for the two counsel who had not intended to address the Senate to make such preparation; but in the progress of the case I have made such notes and memoranda that I think I could argue the case before you; and I feel constrained by a sense of duty to ask the Senate, under these circumstances, to allow the whole of the counsel to make addresses.

I beg leave to assure you, senators, that in doing this I am not animated, as I trust, by a spirit of idle vanity, and by the desire to make an address in a great cause like this. I have lived long enough in the world to know that sometimes we can make more by our silence than by an effort to make a public address. I am satisfied from my experience that great risks attend such an

effort, especially when we attempt to address the Senate or any other assembly extemporaneously; and were I to consult my own feelings and inclinations, I would not make this request; but, under the peculiar circumstances by which we are surrounded, if the Senate are willing to enlarge the rule, I choose to take the risk and to take my chances of endeavoring to argue the case before you, and I feel, senators, that, under existing circumstances, this is not an unreasonable request.

I may say, although I am not expressly authorized to do so, that I am satisfied the President desires that his cause shall be argued by the two additional counsel whom he has provided in the case, besides the three counsel who were heretofore selected for that purpose; and I trust you will not deny us this right. I trust that you will feel at liberty to extend it to all the counsel in the case. If we choose to avail ourselves of it we will do so. I have no sort of objection, so far as I am concerned, that the same right shall be extended to all or to more than an equal number of the managers on the other side. I trust that the resolution will be so shaped as to embrace all the counsel who are engaged in the cause in behalf of the President. I do not know that under these circumstances I shall be able to interest the Senate at all. But it is a case of great importance. On the trial of Judge Chase, six of the managers were permitted to address the Senate, and five of the counsel for the defendant were permitted to address the Senate; and in a great case like this, one of such momentous magnitude, a case in which the whole country is interested, is it asking, senators, too much at your hands, that you will enable us to present his case in the best manner that we may be able to do under the circumstances by which we are surrounded?

The CHIEF JUSTICE. The question is on the amendment proposed by the senator from Missouri, (Mr. Henderson.) The Secretary will read the original proposition again, and also the amendment.

The CHIEF CLERK. The original order is as follows:

Ordered, That two of the managers on the part of the House be permitted to file their printed or written arguments on or before 11 o'clock to-morrow, and that after an oral opening by a manager and the reply of one of the President's counsel, another of the President's counsel shall have the privilege of filing a written or making an oral address, to be followed by the closing speech of one of the President's counsel and the final reply of a manager under the existing rule.

The amendment of the senator from Missouri is to strike out all after the word "ordered" and insert:

That all the managers not delivering oral arguments may be permitted to file written arguments at any time before the 24th instant, and the counsel for the President not making oral arguments may file written arguments at any time before 11 o'clock of Monday, the 27th instant.

Mr. HOWARD. Mr. President, I rise to make an inquiry, whether the proper construction of the amendment offered by the honorable senator from Missouri does not open the door and repeal the twenty-first rule; in short, whether it does not allow all the counsel on the part of the accused and all the managers who may see fit to make oral arguments in the final summing up?

Mr. CONNESS. To make that——

Mr. EDMUNDS. I object to debate.

Mr. CONNESS. To make that entirely clear, I move to insert the words "in accordance with the twenty-first rule."

The CHIEF JUSTICE. "Subject to the twenty-first rule."

Mr. CONNESS. Yes, "subject to the twenty-first rule."

Mr. HENDERSON. I accept the modification. That is what it means now.

The CHIEF JUSTICE. The Secretary will read the substitute as modified.

The chief clerk read as follows:

Ordered, That all the managers not delivering oral arguments may be permitted to file written arguments at any time before the 24th instant, and the counsel for the President not making oral arguments may file written arguments at any time after 11 o'clock of Monday, the 27th instant, subject, however, to the twenty-first rule.

Digitized by Google

Mr. CONNESS. I wish to insert that language at the beginning after the word "that," so that it will read "that, subject to the twenty-first rule" so and so shall be done.

Mr. HENDERSON. I suggest, after the words "oral arguments," to insert, "except the two managers delivering oral arguments under the twenty-first rule."

The CHIEF JUSTICE. The Chief Justice will suggest to the senator from Missouri that his object will be attained by accepting the amendment proposed by the senator from California, inserting the words "subject to the twenty-first rule."

Mr. CONNESS. I ask if it was my privilege to offer it as an amendment. I do not know why it was not accepted.

The CHIEF JUSTICE. The Chief Justice understood it to be accepted.

Mr. CONNESS. I suggest to the Secretary to write it.

The CHIEF JUSTICE. It was written and was accepted, as the Chief Justice understood, and then after it was accepted the senator from Missouri proceeded still further to modify his amendment.

Mr. CONNESS. I ask the Secretary to read it again as I moved it.

The chief clerk read as follows:

Ordered, That, subject to the twenty-first rule, all the managers not delivering oral arguments may be permitted to file written arguments at any time before the 24th instant, and the counsel for the President not making oral arguments may file written arguments at any time before 11 o'clock of Monday, the 27th instant.

The CHIEF JUSTICE. The senator from California moves to amend the amendment proposed by the senator from Missouri by inserting after the word "that" the words "subject to the twenty-first rule."

The amendment to the amendment was agreed to.

Mr. TRUMBULL. Is an amendment still in order?

The CHIEF JUSTICE. It is.

Mr. TRUMBULL. I move to strike out all after the word "that" and insert what I send to the Chair.

The CHIEF CLERK. It is proposed to amend the amendment by striking out all after the word "that" and inserting:

As many of the managers and of the counsel for the President as desire to do so be permitted to file arguments or to address the Senate orally.

Mr. EDMUNDS, Mr. STEWART, and others called for the yeas and nays, and they were ordered.

Mr. CORBETT. I call for the reading again.

The CHIEF JUSTICE. The clerk will report the order, the amendment proposed, and the proposed amendment to the amendment.

The CHIEF CLERK. The order originally proposed is as follows:

Ordered, That two of the managers on the part of the House be permitted to file their printed or written arguments on or before 11 o'clock to-morrow; and that after an oral opening by a manager and the reply of one of the President's counsel, another of the President's counsel shall have the privilege of filing a written or of making an oral address, to be followed by the closing speech of one of the President's counsel and the final reply of a manager under the existing rule.

The senator from Missouri (Mr. Henderson) proposes to amend that by striking out all after the word "Ordered" and inserting:

That, subject to the twenty-first rule, all the managers not delivering oral arguments may be permitted to file written arguments at any time before the 24th instant, and the counsel for the President not making oral arguments may file written arguments at any time before 11 o'clock of Monday, the 27th instant.

The senator from Illinois (Mr. Trumbull) proposes to amend the amendment by striking out all after the word "that" and inserting:

As many of the managers and of the counsel for the President as desire to do so be permitted to file arguments or to address the Senate orally.

The CHIEF JUSTICE. The question is on the amendment proposed by the senator from Illinois to the amendment of the senator from Missouri.

Digitized by Google

The question being taken by yeas and nays, resulted—yeas, 29; nays, 20; as follows:

YEAS—Messrs. Anthony, Buckalew, Conkling, Cragin, Davis, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morrill of Maine, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ramsey, Saulsbury, Sherman, Sprague, Tipton, Trumbull, Van Winkle, Vickers, Willey, and Yates—29.

NAYS—Messrs. Cameron, Cattell, Chandler, Conness, Corbett, Dixon, Drake, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Vermont, Morton, Pomeroy, Ross, Stewart, Sumner, Thayer, and Williams—20.

NOT VOTING—Messrs. Bayard, Cole, Nye, Wade, and Wilson—5.

So the amendment to the amendment was agreed to.

The CHIEF JUSTICE. The question recurs on the amendment as amended.

Mr. BUCKALEW. I move to amend further by adding at the end of the amendment the following words:

But the conclusion of the oral argument shall be by one manager, as provided in the twenty-first rule.

Mr. TRUMBULL. That would be so necessarily.

The amendment to the amendment was agreed to.

The CHIEF JUSTICE. The question recurs on the amendment of the senator from Missouri, [Mr. Henderson,] as amended on the motion of the senator from Illinois, [Mr. Trumbull.]

Mr. CAMERON. I rise to inquire whether a substitute would be in order now.

The CHIEF JUSTICE. An amendment to either proposition will be in order. Does the senator from Pennsylvania propose to offer an amendment?

Mr. CAMERON. Yes, sir, by way of substitute.

The CHIEF JUSTICE. It will be in order to move a substitute to strike out all after the word "that" in the amendment.

Mr. CAMERON. I send my amendment to the Chair.

The CHIEF CLERK. It is proposed to strike out all after the word "that" in the amendment as amended and to insert:

All the managers and all the counsel for the President be permitted to file written or printed arguments by 11 o'clock to-morrow.

Mr. EDMUNDS. Mr. President, I wish to inquire whether that is offered as a substitute for the original proposition or for the amendment.

The CHIEF JUSTICE. For the amendment.

Mr. EDMUNDS. Then I rise to a point of order, that it is not in order on account of our having voted that the amendment should stand as it is.

The CHIEF JUSTICE. The Chief Justice is of opinion that it is in order as an amendment. The question is on the amendment proposed by the senator from Pennsylvania, [Mr. Cameron,] to strike out all after the word "that" in the amendment as amended, and insert what has been read.

Mr. HOWE. I move to lay the order and the amendment on the table.

The motion was not agreed to.

The CHIEF JUSTICE. The question recurs on the amendment proposed by the senator from Pennsylvania, [Mr Cameron.]

The amendment was rejected.

The CHIEF JUSTICE. The question recurs on the amendment of the senator from Missouri as amended on the motion of the senator from Illinois.

Mr. YATES. I move to strike out all after the word "that" and insert the following.

The CHIEF JUSTICE. The Secretary will read the amendment proposed by the senator from Illinois, [Mr. Yates.]

The chief clerk read the amendment, which was to strike out all after the word "that" and to insert:

Four of the managers and four of the counsel for the respondent be permitted to make printed or written or oral arguments, the managers to have the opening and closing.

Mr. YATES called for the yeas and nays, and they were ordered.

Digitized by Google

Mr. JOHNSON. I move to amend by inserting at the close "subject to the limitation in the 21st rule," as to the closing of the case, because otherwise all the managers might close.

The CHIEF JUSTICE. The amendment is not in order, unless it is accepted by the senator from Illinois. The senator from Maryland proposes to add "subject to the limitation in the 21st rule." Does the senator from Illinois accept the amendment?

Mr. YATES. Yes, sir.

Mr. ANTHONY. I ask unanimous consent to make an inquiry. Does not this order allow all four of the managers to reply after all four of the President's counsel have spoken?

Mr. JOHNSON. Not as it is now amended.

The CHIEF JUSTICE. The Chief Justice thinks it does not. The Secretary will read the amendment as it now stands.

The CHIEF CLERK. It is proposed to amend the amendment by striking out all after the word "that" and inserting.

Four of the managers and four of the counsel for the respondent be permitted to make printed or written or oral arguments, the managers to have the opening and closing, subject to the limitation of the 21st rule.

Mr. GRIMES. I call for the reading of the 21st rule.

The CHIEF JUSTICE. The Secretary will read the 21st rule.

The chief clerk read as follows:

XXI. The case on each side shall be opened by one person. The final argument on the merits may be made by two persons on each side, (unless otherwise ordered by the Senate upon application for that purpose,) and the argument shall be opened and closed on the part of the House of Representatives.

The CHIEF JUSTICE. The question is on the amendment proposed by the senator from Illinois [Mr. Yates] to the amendment as amended proposed by the senator from Missouri, [Mr. Henderson.] Upon this question the yeas and nays have been ordered.

The question being taken by yeas and nays, resulted—yeas, 18; nays, 31; as follows:

YEAS—Messrs. Buckalew, Conkling, Corbett, Cragin, Davis, Doolittle, Fowler, Hendricks, Howard, McCreery, Morgan, Morton, Norton, Saulsbury, Sprague, Van Winkle, Vickers, and Yates—18.

NAYS—Messrs. Anthony, Bayard, Cameron, Cattell, Chandler, Dixon, Drake, Edmunds, Ferry, Fessenden, Frelinghuysen, Grimes, Harlan, Henderson, Howe, Johnson, Morrill of Maine, Morrill of Vermont, Patterson of Tennessee, Pomeroy, Ramsey, Ross, Sherman, Stewart, Sumner, Thayer, Tipton, Trumbull, Willey, Williams, and Wilson—31.

NOT VOTING—Messrs. Cole, Conness, Nye, Patterson of New Hamphire, and Wade—5.

So the amendment to the amendment was rejected.

The CHIEF JUSTICE. The question recurs on the amendment as amended.

Mr. FRELINGHUYSEN. I should like to hear the original proposition, as moved, I believe, by the senator from California, read.

Mr. HENDRICKS. Mr. President, I move to postpone the further consideration of this subject until the close of the first argument on the part of the managers. I think that argument ought to proceed.

The motion was not agreed to; there being, on a division—ayes, 19; noes, 22.

The CHIEF JUSTICE. The question recurs on the amendment of the senator from Missouri [Mr. Henderson] as amended on motion of the senator from Illinois [Mr. Trumbull] to the original proposition made by the senator from Maryland, [Mr. Vickers.] Both the original order and the proposed amendment will be read.

The CHIEF CLERK. The original order is as follows:

Ordered, That two of the managers on the part of the House be permitted to file their printed or written arguments on or before 11 o'clock to-morrow, and that after an oral opening by a manager and the reply of one of the President's counsel, another of the President's counsel shall have the privilege of filing a written or of making an oral address, to be

followed by the closing speech of one of the President's counsel and the final reply of a manager under the existing rule.

The amendment as amended proposes to strike out all after the word "Ordered," and to insert:

That as many of the managers and of the counsel for the President as desire to do so be permitted to file arguments or to address the Senate orally, but the conclusion of the oral argument shall be by one manager, as provided in the 21st rule.

The CHIEF JUSTICE put the question on the amendment as amended, and declared himself at a loss to decide the result.

Mr. HOWARD called for the yeas and nays, and they were ordered; and being taken, resulted—yeas, 28; nays, 22; as follows:

YEAS—Messrs. Anthony, Conkling, Cragin, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morrill of Maine, Morton, Norton, Patterson of Tennessee, Saulsbury, Sherman, Sprague, Tipton, Trumbull, Van Winkle, Vickers, Willey, and Yates—28.

NAYS—Messrs. Bayard, Buckalew, Cameron, Cattell, Chandler, Corbett, Drake, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Vermont, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Stewart, Sumner, Thayer, Williams, and Wilson—22.

NOT VOTING—Messrs. Cole, Conness, Nye, and Wade—4.

So the amendment as amended was agreed to.

The CHIEF JUSTICE. The question recurs on the order as amended.

Mr. EDMUNDS. I ask for the yeas and nays on that question.

The yeas and nays were ordered; and being taken, resulted—yeas, 28; nays, 22; as follows:

YEAS—Messrs. Anthony, Cragin, Davis, Doolittle, Ferry, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morgan, Morrill of Maine, Morton, Norton, Patterson of Tennessee, Ramsey, Saulsbury, Sherman, Sumner, Tipton, Trumbull, Van Winkle, Vickers, Willey, Wilson, and Yates—28.

NAYS.—Messrs. Bayard, Buckalew, Cameron, Cattell, Chandler, Conkling, Corbett, Dixon, Drake, Edmunds, Frelinghuysen, Harlan, Howard, Howe, Morrill of Vermont, Patterson of New Hampshire, Pomeroy, Ross, Sprague, Stewart, Thayer, and Williams—22.

NOT VOTING.—Messrs. Cole, Conness, Nye, and Wade.—4.

So it was

Ordered, That as many of the managers as desire to do so be permitted to file arguments or to address the Senate orally; but the conclusion of the oral argument shall be by one manager, as provided in the twenty-first rule.

The CHIEF JUSTICE. Gentlemen managers on the part of the House of Representatives, you will please to proceed with the argument.

Hon. JOHN A. LOGAN, one of the managers of the impeachment on the part of the House of Representatives, thereupon, under the order just adopted by the Senate, filed the following argument:

Mr. President and Senators:

When one in public life is suddenly called to the discharge of a novel and important public duty, whose consequences will be great, and whose effects will be historical, he must betray an inordinate self-esteem, and an unpardonable lack of modesty, if he did not at the outset acknowledge his diffidence, and solicit forbearance.

And, sirs, more than any other man do I feel that it becomes me to invoke the charity and to ask the leniency of this honorable tribunal. For surely, never since the foundation of this government, has there been cast upon any of its servants a duty so high and important in its nature, so unusual and unexpected in its character, and so full of good or ill in its consequences, as the duty with which the managers on behalf of the people now find themselves charged, and one part of which I now reluctantly find myself called upon to perform. I shall be sustained throughout my effort by the consciousness that the cause I in part represent is too great to be weakened by my weakness, and by the sincere hope that, however feeble may be my efforts, and however apparent may be my

imperfections, I shall not be accused of a want of fairness, or found lacking in concession and candor.

I wish to assure you, senators—I wish most earnestly and sincerely to assure the learned and honorable counsel for the defence, that we speak not only for ourselves but for the great body of the people when we say that we regret this occasion, and we regret the necessity which has devolved this duty upon us. Heretofore, sirs, it has been the pride of every American to point to the chief magistrate of his nation. It has been his boast that to that great office have always been brought the most pre-eminent purity, the most undoubted integrity, and the most unquestioned loyalty which the country could produce. However fierce might be the strife of party; however clamorous might be the cry of politics; however desperate might be the struggles of leaders and of factions, it has always been felt that the President of the United States was an administrator of the law in all its force and example, and would be a promoter of the welfare of his country in all its perils and adversities. Such have been the hopes and such has been the reliance of the people at large; and in consequence, the chief executive chair has come to assume in the hearts of Americans a form so sacred and a name so spotless that nothing impure could attach to the one, and nothing dishonorable could taint the other. To do aught, or to say aught which will disturb this cherished feeling, will be to destroy one of the dearest impressions to which our people cling.

And yet, sirs, this is our duty to-day. We are here to show that President Johnson, the man whom this country once honored, is unfitted for his place. We are here to show that in his person he has violated the honor and sanctity of his office. We are here to show that he usurped the power of his position and the emoluments of his patronage. We are here to show that he has not only wilfully violated the law, but has maliciously commanded its infringement. We are here to show that he has deliberately done those things which he ought not to have done, and that he has criminally left undone those things which he ought to have done.

He has betrayed his countrymen, that he might perpetuate his power, and has sacrificed their interests, that he might swell his authority. He has made the good of the people subordinate to his ambition, and the harmony of the community second to his desires. He has stood in the way which would have led the dismembered States back to prosperity and peace, and has instigated them to the path which led to discord and to strife. He has obstructed acts which were intended to heal, and has counselled the course which was intended to separate. The differences which he might have reconciled by his voice, he has stimulated by his example. The questions which might have been amicably settled by his acquiescence, have been aggravated by his insolence; and in all those instances whereof in our articles we complain, he has made his prerogatives a burden to the commonwealth, instead of a blessing to his constituents.

And it is not alone that in his public course he has been shameless and guilty, but that his private conduct has been incendiary and malignant. It is not only that he has notoriously broken the law, but that he has criminally scoffed at the framers of the law. By public harangue and by political arts he has sought to cast odium upon Congress and to insure credit for himself; and thus, in a government where equal respect and dignity should be observed in reference to the power and authority conferred upon each of its several departments, he has attempted to subvert their just proportions and to arrogate to himself their respective jurisdictions. It is for these things, senators, that to-day he stands impeached; and it is because of these that the people have bid us prosecute. That we regret it, I have said; that they regret it, I repeat; and though it tears away the beautiful belief with which, like a drapery, they had invested

Digitized by Google

the altar, yet they feel that the time has come when they must expose and expel the sacriligious priest, in order to protect and preserve the purity of the temple

Yes, senators, Andrew Johnson, President of the United States, now stands arraigned at this bar to answer to the high crimes and misdemeanors which an indignant and outraged people have at length alleged against him. This trial has given us many surprises, but no one fact has given us more surprise than the tone of complaint, which, by his counsel, he has assumed. Of what should he complain? Did he think that he could proceed in his unwarrantable course forever with impunity? Did he suppose that he could break down every rule and safeguard in the land, and that none should say him nay? Did he believe that because the people were for a time stricken into silence by the audacity of his acts, they would suffer in sadness and continue to be dumb? Did he not know that they were jealous of their liberties and rights, and in the end would punish him who attempted to tamper with either; and now that they are visiting upon him the inevitable result of his misdeeds, is it of this that he complains? He should rather give them thanks that they have spared him so long, and be grateful that their magnanimity has preserved him to this hour. Is it of the articles alleged against him that he complains? Sirs, the people have selected the latest but not the greatest instance of his dereliction. They hesitated, in the first instance, to think that the actions which they knew were insidious were intended to be revolutionary. They preferred to attribute to the frailty of his mind what they should have ascribed to the duplicity of his heart; and when, day after day, the evidences of his falsehood became stronger and stronger; when month after month the baseness of his purpose became more and more palpable, and when session after session the proof of his desertion became more and more convincing, still they hesitated, until further hesitation as to him would have been certain destruction to them, and they presented through us, not his most flagrant offences, but only his last offendings. Should he complain that they denounce for the lesser, when he is equally guilty of the greater crimes? Is it of this tribunal that he complains? You, Mr. President, preside, and most worthily preside, over the Supreme Court, which is the court of last resort in all this land. To you and your associates is left the final arbitrament of the most grave and important controversies which concern our people. By your education and habit you are fitted to pass upon serious issues. You are raised by your jurisdiction above the ordinary passions and prejudices of the lesser courts; and this of itself is a guaranty of your impartiality in a forum like this. And you, senators, by the theory and structure of our government are constituted its most select and responsible legislators. By the arrangement and disposition of the functions of our federal powers, you occupy a sphere the exact parallel to which is found in no other government of the world. You are of the President; and yet so far separated from him that you are beyond his flatteries and above his threats. You are of the people; and yet so far removed from them that you are not affected by their local excitements, you are not swayed by their passions nor influenced by their tumults. When the Constitution fixed the age of eligibility to the Senate, it was that your minds should be matured and that your judgments should be ripened; it was that you should have come to that period when reason is not obscured by passion, and wisdom is gathered of experience. To such an august body have the people committed their grievances; and of this he certainly should not complain. Does he complain of us? Sirs, it may be that he does; but yet I feel that he should not. What we have done, we have done promptly, but none the less reluctantly. We felt, as citizens, the irresistible conviction that this man was false to every citizen; and we felt, as managers, that we did not dare to jeopardize, by unseemly delay or fatal favors, the safety of a nation. We thought

"If it were done, when 'tis done, then 'twere well it were done quickly."

There had been too much dallying with treason already. If but a few short

Digitized by Google

years ago traitors had been quickly seized and speedily punished, there would never have been a shot fired in rebellion. If plotters had been made to feel the early gripe of the law, there never would have been a resort to arms. When we looked back and recalled the memories of our battle-fields—when we saw the carnage amid the slain, the unutterable woe of the wounded—when we remembered the shriek of the widow, and the sob of the orphan—when we reflected on the devastation of our land, and the burdens now on our people—when we turned us about and saw in every direction the miseries and the mischiefs which follow every war, no matter how just, and when we reminded ourselves that all this would not have been, had treason been executed for its overt acts before yet its hands were red; and when we felt, as we do all feel, that to delay might bring all this and more again upon us, we could not and did not pause. We urged this trial at "railroad speed." In view of such results, self-preservation would have dictated that we should ask for "lightning speed." Ought he to complain? If he is guilty, then there is no speed too great for his deserts. If he is innocent, there is none too great for his deliverance. It is the fact, then, that we have desired to advance this case with all possible speed; but it is not the fact that we have advanced with all possible rigor. We only desired to be just; we did not wish to be severe. If we had been actuated by any spirit other than a sense of our high duty, we might have given the President cause to complain. We might have asked, and asked it in the strength of authority, too, that pending the trial he should have been placed under arrest, or at least suspended from his office. The English practice would have sanctioned this. May, in his treatise on the law, privilege, &c., of Parliament, says:

If the accused be a peer he is attached or retained in custody by order of the House of Lords; if a commoner, he is taken into custody by the sergeant-at-arms attending the Commons, by whom he is delivered to the gentleman usher of the black rod, in whose custody he remains until he is admitted to bail by the House of Lords, or otherwise disposed of by their order. (Chapter 23.)

In Wooddison, we find it was customary for the Commons to request the Lords that the person impeached "may be sequestered from his seat in Parliament, or be committed, or that the peers will take order for his appearance according as the degree of the imputation justifies more or less severity." The Commons demanded that Clarendon be sequestered from Parliament and committed. (6 Howell's State Trials, 395; 11 Howell, 733.)

Lord Stafford was sequestered in 1641. (2 Nalson's Collections, 7.)

In the matter of the impeachment of Blount, it was ordered by the Senate as follows, July 7, 1797:

That the said William Blount be taken into the custody of the messenger of this house until he shall enter into recognizance, himself in the sum of $20,000, with two sufficient sureties in the sum of $15,000 each, to appear and answer such articles of impeachment as may be exhibited against him.

On the 18th day of June, 1788, in the Virginia convention, George Mason objected to the pardoning power vested in the President for ordinary crimes. Mr. Madison in reply said: "There is one security in this case to which gentlemen may not not have adverted; if the President be connected in any suspicious manner with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they (evidently referring to the Senate, or the Senate in connection with the House) can remove him if found guilty; *they can suspend him when suspected*, and the power will devolve upon the Vice-President."

Therefore, as we have not asked what we might have so consistently demanded, I feel that he has no ground of discontent with us. What, then, is he to answer? He is to make defence to the charge of high crimes and misdemeanors which the people of the United States, in virtue of their sovereignty, do proclaim against

Digitized by Google

him. I wish to be distinctly understood, when I say that the allegation comes from the people in their sovereignty—in their supreme capacity as the rulers of us all. By remembering this, we may escape from the narrow confines of legal technicalities, and be governed by more extended and liberal rules than prevail in the courts of the common law. It shall not be truthfully said that the charges which come from a whole people are frivolous and vain; it shall not longer be claimed that that which a community in its aggregate capacity asserts is insufficient and of no avail; the mighty mass of men who are the nation—the great unit of minds who are this Union—of minds enlightened, of thoughts profound, of discrimination quick, and purpose steady, of hearts free, of souls resolved, of all the elements which make this nation what it is—a nation young in years, but mature in action. The murmur of this nation is mighty, and its accusations cannot be ignored. Here, at least, it may be said: "*Vox populi vox Dei*"—"the voice of the people is the voice of God." It is for this reason that neither a demurrer to test any questions of law, or a motion to quash, to decide any questions of fact, have ever been permitted to be interposed against any article of impeachment, no matter wherever or whenever such have been presented. And yet, before issue joined upon the present occasion, it was asseverated against those who favored this proceeding that they were about to pervert the Constitution, to submerge the law, and further their partisan ambitions by the proclamation of charges, which on their face are fabulous and weak, if not absurd and contumacious; and in the answer which this respondent has made he has announced, as one of the issues upon which you are to pass, that several of our articles are insufficient in law, and inadequate in fact. I repeat, sirs, that this is an anomalous answer. The fiat of a people when solemnly pronounced against one to whom they have delegated official favors, and whom they have charged with derelictions of official duty, can never be treated as an empty sound, nor their inquiry regarded as an idle ceremony. And here I wish to impress upon these triers the important fact, that every article which we here present stands in the light of a separate count in an indictment, and must be decided as a separate issue on its own merits. It should not be permitted, where any count is found to contain matter of substance, that the accused should have a verdict of not guilty, because of insufficiency in matters of form.

It is the rule that all questions of law or of fact are to be decided, in these proceedings, by the final vote upon the guilt or innocence of the accused. It is also the rule, that in determining this general issue senators must consider the sufficiency or insufficiency in law or in fact of every article of accusation. But the insufficiency which they are to consider is not the technical insufficiency by which indictments are measured. No mere insufficiency of statement—no mere want of precision—no mere lack of relative averments—no mere absence of legal verbiage, can inure to the benefit of the accused. The insufficiency which will avail him must be such an entire want of substance as takes all soul and body from the charge and leaves it nothing but a shadow. Neither shall the respondent be allowed to escape because of any immaterial variance between the averment and the proof. If we have succeeded in sustaining the principal weight of each separate article, then we are entitled to a finding upon each. These are the propositions, which I gather from the following authorities: Trial of Judge Peck, page 232, (Mr. Wirt, counsel for respondent;) Mr. Webster, in the trial of Judge Prescott, page 25; Mr. Shaw, in the same case, page 45; Report from the committee of the House of Commons appointed to inspect the Lords Journals, April 30, 1794.

Story on the Constitution says:

It is obvious that the strictness of the forms of proceeding in cases of offences at common law, are ill-adapted to impeachments. The very habits growing out of judicial employments, the rigid manner in which the discretion of judges is limited and fenced in on all sides in

order to protect persons accused of crimes, by rules and precedents, and the adherence to technical principles which, perhaps, distinguishes this branch of the law more than any other, are all ill-adapted to the trial of political offences in the broad course of impeachments. * * * * There is little technical in the mode of proceeding; the charges are sufficiently clear, and yet, in a general form, there are few exceptions which arise in the application of evidence, which grow out of mere technical rules and quibbles; and it has repeatedly been seen that the functions have been better understood, and more liberally and justly expounded by statesmen than by mere lawyers. An illustrious instance of this sort is upon record in the case of the trial of Warren Hastings, where the question whether an impeachment was abated by a dissolution of Parliament, was decided in the negative by the House of Lords, as well as the House of Commons, against what seemed to be the weight of professional opinion. (Story, sec. 762, 763.)

WHAT ARE IMPEACHABLE OFFENCES?

The next question which it is proper to ask is, For what crimes and misdemeanors may an officer be impeached? Can he be impeached for any other than an indictable offence? The authorities certainly sustain the managers in asserting that he may be. We cannot search through all the cases, as they are too numerous, but will call the attention of the Senate to some that should be regarded as good authority, and the opinions of those who should be regarded as learned in the law.

Mr. Madison, in discussing the power of the President, used the following language:

What will be the motives which the President can feel for the abuse of his power and the restraints that operate to prevent it? In the first place, he will be impeachable by this house before the Senate for such an act of mal-administration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust. (Annals of Congress, 1804–'5, vol. i, page 517.)

The trial of Blount, 1788–'89. Story, in speaking of that case, says:

In the argument upon Blount's impeachment, it was pressed with great earnestness that there is not a syllable in the Constitution which confines impeachment to official acts, and it is against the plainest dictates of common sense that such a restraint should be imposed. (Story, sec. 802.)

Trial of Judge Chase, February 26, 1805. Mr. Manager Nicholson says:

If, therefore, the President of the United States should accept a bribe, he certainly cannot be indicted for it, and yet no man can doubt that he might be impeached. If one of the heads of departments should undertake to recommend to office for pay, he certainly might be impeached for it, and yet I would ask under what law and in what court could he be indicted. (Judge Chase's Trial, page 564.)

In the trial of Judge Chase, Mr. Manager Randolph says:

It has been contended that an offence to be impeachable must be indictable. For what, then, I pray you, was it that this provision of impeachment found its way into the Constitution. * * * If the Constitution did not contemplate a distinction between an impeachable and an indictable offence, whence this cumbrous and expensive process, which has cost us so much labor and so much anxiety to the nation? Whence this idle parade—this wanton waste of time and treasure—when the ready intervention of a court and jury alone was wanting to rectify the evil? (Annals of Congress, 1804–'5, page 642.)

By permission of the senators I will read some extracts that I have made from the speeches of some of the most learned men of England on this same question, which was discussed in the trial of Queen Caroline in the year 1820.

Earl Grey, in speaking of the powers of Parliament, said:

He must maintain this principle, supported on the ground of parliamentary law, and bottomed on the constitution of the country, that on all occasions, when a great state necessity or a matter of great state expediency exists, Parliament were vested with extraordinary powers, and it became their duty to exercise those extraordinary powers in order to procure that remedy commensurate with such state necessity or expediency, which no proceeding in a court of law could effect. (1st vol. p. 8, Trial Queen Caroline.)

In the same case, Brougham (since made a lord) said:

Impeachment was a remedy for cases not cognizable by the ordinary jurisdiction. * * The House of Commons might impeach for whatever was indictable, but they also might impeach in cases where no indictment could be found. He submitted, therefore, that some

satisfactory reason ought to be stated why impeachment was not resorted to in this instance. (Vol. 1, p. 22.)

Again, he says:

The learned attorney general had held that no impeachment could lie unless some law was violated; but the opinion was contrary to the doctrine laid down by the greatest writers on the law of impeachment. Lord Coke did not so limit the power of Parliament. He regarded this power as most extensive, and in describing it quoted this remarkable expression: "That it was so large and capacious that he could not place bounds, to it either in space or time." In short, this maxim has been laid down as irrefragable, that whatever mischief is done, and no remedy could otherwise be obtained, it is competent for Parliament to impeach. * * * Why was impeachment competent in the case of the misdemeanor of a public functionary? Expressly because no remedy was to be found by any other means; because an act had been committed which justice required should be punished, but which could only be reached by Parliament. * * * * * * *

It happened that the very first impeachment which occurred in the history of Parliament was one which neither related to a public officer nor to any offence known to the law. It was the case of Richard Lyons and others, who were complained of for removing the staple of wool to Paris, for lending money to the king on usurious contracts. The statute against usury had not then been passed, and there were various other charges against the parties which formed no legal offence. The case was one in which merchants were, among other things, charged with compounding duties with the king for a small percentage.

Also the "case of Sir Giles Mompessen, for the sale of patents." This was not an indictable offence, and is the more remarkable from being recorded in "Coke's Institutes." Hence, we find that in the very inception of trials of impeachment no indictable offence need have been committed.

Again, we find Mr. Brougham stating:

"That the house would exercise the right of impeachment, not because the offence was liable to a five pounds penalty—not because it was indictable, but because some evil had been committed which the ordinary courts of law could not reach. This he conceived was the only constitutional principle upon which impeachment rested. * * * The case of Mr. Hastings illustrates his argument, for of the articles of impeachment proferred against him, four out of five were for offences of a nature of which no court of law could take cognizance. (Vol. 1, pp. 62 and 63.)

I again call attention to the arguments and opinions of learned men of our own country, which most clearly sustain our view on the point now under discussion.

On the trial of Judge Peck, Mr. Manager Buchanan says:

A gross abuse of granted power, and an usurpation of power not granted, are offences equally worthy of and liable to impeachment. (Page 428.)

In the same case, Mr. Manager Wickliffe's remarks are so applicable to the conduct of the respondent that I may be pardoned for giving them in this connection. He says:

Take the case of the President of the United States. Suppose him base enough—or foolish enough, if you please—to refuse his sanction to any and every act which Congress may pass. This is a power which, according to the Constitution, he can exercise. Will it be contended that he could be indicted for it as a misdemeanor in any court, state or federal? Yet, where is the man who would hesitate to remove him from office by impeachment? (Peck's Trial, 1831, page 309.)

In the same case, Mr. Wirt, of counsel for the respondent, said:

(Constitution, art. 2, sec. 4.) "The President, Vice-President, and all civil officers shall be removed from office on impeachment for, and on conviction of, treason, bribery, or other high crimes or misdemeanors." The Constitution itself defines treason, but it does not define bribery, nor does it define those other high crimes and misdemeanors for which these officers may be impeached and removed. Now, what does the Constitution mean by the expression high crimes and misdemeanors? It has a meaning; what is it? and where are you to look for it? The phrase is obviously borrowed from the common law; this instrument thus, by its own terms, connects itself, in this instance, with the common law, and authorizes you to go to that law for an explanation of its meaning. In the very proceeding, therefore, in which you are now engaged, the common law is in force for the definition of the high crime or misdemeanor which you are called on to punish. (Peck's Trial, pp. 498 and 499.)

Mr. Story, in discussing what are the functions to be performed in impeachments, says:

The offences to which the power of impeachment has been and is ordinarily applied as a

Digitized by Google

remedy, are of a political character, * * * * what are aptly termed political offences, growing out of personal misconduct or gross neglect, or usurpations, or habitual disregard of the public interests, in the discharge of duties of political office These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty. They must be judged of by the habits, and rules, and principles of diplomacy, of departmental operations and arrangements; in short, by a great variety of circumstances, as well those which aggravate as those which extenuate or justify the offensive acts; which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed from the reach of municipal jurisprudence. * * * * * * (Story on Const., see 762.)

Treason is defined in the Constitution itself; bribery is defined by common law; and Mr. Story, in discussing the definition of impeachable crimes, says:

The only practical question is, What are deemed high crimes and misdemeanors? Now, neither the Constitution nor any statute of the United States has in any manner defined any crimes except treason and bribery to be high crimes and misdemeanors, and as such impeachable. In what manner, then, are they to be ascertained? Is the silence of the statute book to be deemed conclusive in favor of the party until Congress have made a legislative declaration and enumeration of the offences which shall be deemed high crimes and misdemeanors? If so, then, as has been truly remarked, the power of impeachment, except as to the two expressed cases, is a complete nullity; and the party is wholly dispunishable, however enormous may be his corruption or criminality. (Story's Com., Sec. 794.)

In further reasoning upon the same subject, he says:

There are many offences, purely political, which have been held to be within the reach of parliamentary impeachments, not one of which is in the slightest manner alluded to in our statute books. And, indeed, political offences are of so various and complex a character, so utterly incapable of being defined or classified, that the task of positive legislation would be impracticable, if not almost absurd to attempt it. * * * The only safe guide, in such cases, must be the common law, which is the guardian at once of private rights and public liberties; and however much it may fall in with the political theories of certain statesmen and jurists, to deny the existence of a common law belonging to and applicable to the nation in ordinary cases, no one yet has been bold enough to assert that the power of impeachment is limited to offences positively defined in the statute book of the Union as impeachable high crimes and misdemeanors. (Sec. 798.)

Also same authority:

In examining the parliamentary history of impeachments, it will be found that many offences not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanors, worthy of this extraordinary remedy. Thus lord chancellors and judges and other magistrates have not only been impeached for bribery, and acting grossly contrary to the duties of their office, but for misleading their sovereign by unconstitutional opinions, and for attempts to subvert the fundamental laws, and introduce arbitrary power. So, where a lord chancellor has been thought to have put the great seal to an ignominious treaty; a lord admiral to have neglected the safeguard of the sea; an ambassador to have betrayed his trust; a privy counsellor to have propounded or supported pernicious and dishonorable measures; or a confidential adviser of his sovereign to have obtained exorbitant grants, or incompatible employments—these have been all deemed impeachable offences. (Story's Com., book 3, chap. 10, sec. 798.)

Mr. Story, after his examination of impeachment trials in England and the few cases in this country, came to the following conclusion in regard to the rule applicable to trials of impeachment before the Senate of the United States:

Congress have unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct, and the rules of proceeding, and the rules of evidence, as well as the principles of decision, have been uniformly promulgated by the known doctrines of the common law and parliamentary usage. In the few cases of impeachment which have hitherto been tried, no one of the charges has rested upon any statutable misdemeanor. (Story's Com., book 3, chapter 10, section 797.)

Although we have shown that both English and American authorities sustain us in the position that an offence need not be punishable or indictable by statute law to be an impeachable offence, yet we are told that British precedent should not influence the case, because they hold the ministers of the Crown accountable for the honesty, legality, and utility of measures proposed by them, and punishable by impeachment for failure in any of these particulars; yet that construction of the law of impeachable offences has obtained because Parlia-

ment in Great Britain is substantially omnipotent: they may pass *ex post facto*, retroactive laws, bills of attainder, and even change the constitution itself; therefore, that, when the Commons present any officer of the government for any claimed offence, it is not to be considered whether it is made so by any pre-existing laws; because, if the Commons impeach and the Peers adjudge the party presented guilty, the joint action of the two houses would only be, in effect, to declare the act complained of to be noxious or injurious, although not so enacted by any previous legislation, and that this would be within their clear right. But that our Constitution, by prohibiting the passage of any retroactive or *ex post facto* law, or any bill of attainder, has limited impeachment for high crimes and misdemeanors to those acts only which have been declared to be such crimes and misdemeanors by pre-existing laws; and, therefore, in this country, whatever might be the case in England, impeachment must be limited to such offences only as are so made by statute, or at common law. There is force and speciousness, to say no more, in this view, and it deserves a careful and candid consideration.

The weight of the argument is derived from the suggestion that the judgment following impeachment is in truth a punishment of crime: that failing, the argument fails. True it is, our Constitution forbids the passage of any retroactive or *ex post facto* law, or bill of attainder, as a punishment for crime; but it is equally true that it says that "judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law." Thus it appears that the judgment of impeachment is not a punishment for crimes nor misdemeanors, but extends only to removal from office or disqualification to hold office, leaving the party (if a crime is committed) to be punished therefor by other provisions of law, which shall neither be retroactive, *ex post facto*, nor in the nature of a bill of attainder.

This provision would seem, therefore, to make it clear that impeachment is *not* a punishment for crime. True, an officer may be impeached for a crime, technically, either by common or statute law, but he cannot be punished therefor as a part of the judgment of impeachment. He can only be removed from office, and his punishment, if any, is left to the ordinary courts. We are led to consider, therefore, whether, in the language of the Constitution and laws of the United States, the term "removal from office" is anywhere used as the penalty for a crime. Of course that phrase must have the same construction, whether found in the Constitution, which is paramount law only, or in the statutes enacted in conformity with the Constitution, which are equally laws of the United States.

Now, it is admitted by all sides that any officer may be removed under our laws for any reason, no reason, or for political reasons simply, the contest between the Executive and Congress being as to the person or body by whom such removal shall be exercised—whether by the President alone, or by the President and Senate in concurrence, or whether such right of removal may be restrained by legislation.

This power of removal by somebody is recognized in a variety of statutes, but nowhere as the penalty for crime. The phrase "removal from office" appears only once in the Constitution. Must it not, therefore, have the same meaning and construction there as it does in the other laws of the United States? Is not this construction of the phrase "removal from office" made certain by the uniform legislation and practice of the government? And as the phrase "removal from office" is only found in the Constitution as the consequence of conviction upon impeachment, the judgment of which can extend no further than such removal or disqualification for office, is it not equally certain that such judgment is not a punishment for crime, and, therefore, that an officer may be removed by

Digitized by Google

impeachment for political reasons, as he may be for the same reasons by any department of the government in which the right of removal is vested?

Is not this view of the constitutional provision strengthened by this consideration—that by the theory of and practice under the Constitution, every officer, other than the President and Vice-President, may be, and in practice is, removable by the power that appointed him at pleasure; or, in other words, when the service of the government, in the judgment of the appointing power, seems to make such removal necessary and proper? Is it not, therefore, more consonant with the theory of the Constitution to hold that the President may be removed from office by presentment of the House, who represent in his case the people who appointed him, if the reasons for the removal shall be found sufficient by two-thirds of the Senate, who, by the Constitution, are to adjudicate thereupon? Can we not illustrate this by supposing a case of inability in the President to perform the duties of his office because of his insanity? Now, insanity is not a crime, but every act of an insane man might, and almost necessarily would, be a misdemeanor in office.

Is the phrase "misdemeanor in office" any more than the Norman French translation of the English word misbehavior? Judges are to hold office during good behavior. Is not that equivalent to saying they hold office during good demeanor, *i. e.*, while they demean themselves well in office? Are not both phrases the equivalent of the Latin one "*dum se bene gesserit?*"

How is an insane president or an insane judge to be removed under our Constitution? Clearly, not until his insanity is ascertained. By whom is that to be ascertained? The Constitution makes no provision, save by presentment by the House, and adjudication by the Senate. And it is remarkable, as sustaining this argument, that the first case of impeachment of a judge under our Constitution, Judge Pickering's, was of an insane man, as the defence allege, and clearly made out by evidence. Judge Pickering was removed, the defence of insanity apparently not being considered by the Senate. Is it not clear that the process of impeachment, under the English constitution, being a mode of punishment of all crimes, as well as a method by which an officer whose official or personal conduct was hurtful to the state might be removed, that our Constitution limiting the form of impeachment to removal, only takes away from it its punitive element which it vests in the ordinary courts of law alone; thus leaving the process of impeachment an inquisition of office for any act of the officer or cause which the House of Representatives might present as, and the Senate adjudicate to be hurtful to the state or injurious to the common weal.

Will any one say that if the President should veto every bill that should pass the Congress, (and there not be a two-thirds vote against his veto,) and thereby defeat all appropriations, so as to completely block the wheels of government, that he could not be impeached for an improper use of said power, although he is authorized by the Constitution to use such power? Here would be a case wherein the exercise of lawful power was done in such a way as to become so oppressive and obviously wrong that there must be a remedy, and impeachment would be the only one.

DEFINITION OF CRIMES AND MISDEMEANORS.

Having thus shown that a party can be impeached for offences not punishable by statute law, it behooves us next to inquire what have been the definitions of crimes and misdemeanors as used by writers of acknowledged authority. It is by the light of these definitions that we are to inquire and determine what culpability, if any, attaches to each and all of the acts by the President of which we complain, and how far he may palliate or justify the act after having admitted its performance. These which I shall read are but few among the many authoritative definitions of crimes and misdemeanors.

Digitized by Google

What is a crime? Blackstone defines a crime or misdemeanor as being—

An act committed or omitted in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms; though in common usage the word crimes is made to denote such offences as are of deeper and more atrocious dye; while smaller faults and omissions of less consequence, are comprised under the gentler name of misdemeanors only. (Blackstone's Commentaries, book 4, page 5.)

The distinction of public wrongs from private crimes, and misdemeanors from civil injuries, seems principally to consist in this: That private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community considered as a community in its social aggregate capacity. (Blackstone's Commentaries, book 4, page 5.)

When the words high crimes and misdemeanors are used in prosecutions by impeachment, the words high crimes and misdemeanors have no definite signification, but are used merely to give greater solemnity to the charge.—Sentence from a note to Blackstone's Commentaries, (5 Christian.)

Or, to state it stronger even than Blackstone does, that the defendant may have the benefit of it, a crime or misdemeanor is the violation of a public law where there shall be a joint operation of act and intention in the perpetration of the act.

Mr. Blake, in discussing Prescott's case, defines a misdemeanor perhaps better than I have heretofore stated it, I will therefore give his definition:

To misconduct is to misbehave; to misbehave is to misdemean; to misdemean is to be guilty of a misdemeanor—nothing more—nothing less. The term is technical, signifying a crime; hence it follows as a conclusion from these premises that misconduct or misbehavior, in its legal interpretation, can signify nothing less.

INTENTION—HOW DETERMINED.

When the unlawful act is shown, how, then, do we gather the intention? It can only be done from all the circumstances surrounding the commission of the act.

I believe it is a rule, both in law and morals, that every man is presumed to intend the natural and probable consequences of his own act. A good motive never accompanies a bad act, nor a bad one a good act.

Mr. Buchanan, in the trial of Judge Peck, states this proposition so clearly that I will adopt his language (with his quotations:) "'Out of the abundance of the heart the mouth speaketh,' 'The tree is known by the fruit,' are axioms which we have derived from the fountain of all truth. Actions speak louder than words, and it is from the criminal actions the judges must infer the criminal intention." * * * Speaking of the respondent, Peck, he says: "If he shall, in an arbitrary manner, and without the authority of law, imprison a citizen of this country, and thus consign him to infamy, are you not to infer his intention from the act? Is not the act itself the best source from which to draw the inference? Must we, without any evidence, in the spirit of false charity and mercy, ramble out of the record to imagine a good motive for this bad conduct? Such rule of decision would defeat the execution of all human laws. No man can doubt but that many a traitor during the American Revolution believed in his conscience that he owed allegiance to the King of Great Britain, and would violate his duty to God if he should lend the least aid in the cause of freedom. But if such a man had committed treasonable acts, will any person say he was not guilty of treason, because in his secret heart he *might* have had a good intention? Does a poor, hungry, naked wretch filch from my pocket a single dollar to satisfy the cravings of appetite, the law infers a felonious intent, and he must be convicted and punished as a thief, though he may have had no other purpose but that of saving himself and his children from starvation. And shall a man who has been selected to fill a high judicial position on account of his knowledge of the laws of the land, be permitted to come before the Senate and

Digitized by Google

say: 'It is very true that I *did* against law imprison an American citizen and deprive him for eighteen (18) months of practising that profession by which he lived; it is true that I violated the Constitution of the United States by inflicting on him unusual punishment, but I did not know any better; I had a good intention.'"

And, Mr. President, in the case at bar are we to be told that this violation of law carries with it no bad motive? that the law was broken merely to test its strength? Is a man to be permitted to break a law under the pretence of testing its constitutionality? Are the opinions of a man against the soundness of a law, to shield him from punishment for the violation of said law? If so, the opinion of the criminal becomes the rule by which you are to try him, instead of the law which he has broken. If this doctrine be established, every traitor in the land will find a complete justification for his many crimes against the government of the United States, in this, that he believed that secession was no violation of the Constitution. Doubtless every robber and murderer has some reason by which he justifies himself, in his own mind, for the commission of his crimes. But is that a justification or excuse in law? Had Booth (the assassin) been captured alive, doubtless on his trial he would have said that he thought he was doing no wrong in murdering the President, could he thereby have advanced the interests of his friends in the south, and would have also stated, no doubt, that he was advised by his friends to commit the act. And the accused claims the same as an excuse for his conduct. He claims that he was advised by his ministers at the heads of the different branches of the executive department. But, sir, in neither case can such an excuse be considered as in the least manner forming any justification or excuse in law. This plea, answer, or excuse pleaded, if believed by the President and his learned counsel as being any excuse whatever for his violations of law, we may here get some clue to the hesitancy in the trial of Jefferson Davis, the great criminal of the rebellion, (inasmuch as he certainly believed he was doing no wrong in breaking the law, as his opinion was that he was maintaining a great principle.) As the counsel, or a part of them, who now defend the President on this principle, must prosecute Jeff. Davis against this principle, it would seem that, by adopting this theory, they will succeed in releasing both instead of convicting either.

Sirs, adopt this new theory, and you thereby unhinge the law, open wide the prison gates, and give safe conduct to every criminal in the land, no matter how high or low his position, or how grave or small his offences.

Having thus shown what are impeachable offences, the definition of crimes and misdemeanors, and how we are to gather the intention of the accused in the violation of a law, it becomes necessary to examine somewhat the basis of the justification stated by the defendant for his action.

RESPONDENT'S DEFENCE TO FIRST TWO CHARGES.

The respondent admits the facts upon which the first charge rest, but denies that they constitute an offence for which he is answerable to this Senate, sitting as a court of impeachment. This denial involves two inquiries:

1. HAD THE PRESIDENT THE POWER TO REMOVE THE SECRETARY OF WAR UNDER THE CIRCUMSTANCES, BY VIRTUE OF THE CONSTITUTION AND THE LAWS AS THEY STOOD PRIOR TO THE PASSAGE OF THE TENURE-OF-OFFICE ACT?

2 HAD HE THE RIGHT TO REMOVE THAT OFFICER UNDER THE TENURE-OF-OFFICE ACT?

It must be conceded that a negative answer to either of these propositions is equivalent to a verdict of guilty. The respondent has stated his defence upon the highest possible grounds, and it is of the first importance that his reasons be put to the severest test, for they underlie the whole network of our admirable system of government. The question here involved was crowded into the smallest compass by the respondent's distinguished premier, on a memorable occasion, when

he put to a gaping multitude, heated by the inflammatory speech of this respondent, this question: "Will you have Andrew Johnson President or King?"

Sir, it was gratuitious in this respondent to attempt to purge himself by his answer of an intent to violate the Constitution and laws of the land. His answer stands upon a right which he claims began with his high office, and has clung to the President as an undisputed prerogative since the days of Washington by virtue of the Constitution. If he is right, the motive, whether good or bad, cannot make him answerable; if he was wrong, the motive follows. The innocent violation of a law is not supposable. If there was in this action of the President the exercise of a rightful power, he must be acquitted of this charge; if he acted outside and in violation of law, he must be convicted, whatever his motive. Let us, then, examine the two inquiries suggested:

Sirs, I think there exists a widespread and dangerous misapprehension as to the powers and prerogatives of the President. We have been in the habit of speaking of three co-ordinate branches of government in such connection and in such manner as to imply that each possesses coequal power with the other. One of the transcendently valuable results of the late war has been the fixing the powers of our three branches of government where they properly belong, the resolving of hitherto blended powers into the original elements of government. The rebellion was a war of encroachments upon the rights of the people. The people triumphed, and they now insist that the victory shall not be a barren one.

I hold that the President of the United States possesses no power other than that given him by the Constitution and the laws; and I mean by this that there are no *inherent* powers in the Executive, no *reserved* authority, no *implied* prerogatives other than those which are necessarily dependent upon and derivable from the expressed constitutional provisions and the laws.

With the evils of a monarchy so fresh in their memory, the framers of the Constitution sought to surround the President with such checks as to make him a mere *executive officer*—the *servant* of the people. His powers were specifically defined and confined to the narrowest compass; except the high honor of receiving embassies as the representative of the government, he was stripped of all attributes of sovereignty; he was given no jurisdiction over the legislative or judicial branches, but on the contrary was made amenable to the former for his unofficial as well as official conduct; he can create no office, and his appointing power is only conditional; he is unable to declare war, or alone make treaties; his authority is mainly *negative*, confined chiefly to offering suggestions to Congress, granting pardons and reprieves, to concluding treaties and appointing ambassadors and other public officers "by and with the advice and consent of the Senate." He is the executive *only*, and "*shall* take care that *the laws* be faithfully executed." He is without the least judicial attribute, and Mr. Kent says:

> When laws are duly made and promulgated they only remain to be executed. No discretion is submitted to the executive officer. It is not for him to deliberate and decide upon the expediency of the law. *What has been once declared to be law under all the cautious forms of deliberation prescribed by the Constitution ought to receive prompt obedience.* (Kent's Commentaries, vol. 1, page 291.)

To the legislative is given the power of supervising the Executive's acts, and to remove him from office for "high crimes and misdemeanors." At the time of the formation of our government so jealous were the people of their rights, and so fearful lest the President might assume undue authority and obtain the power of a monarch, that it was only by the most strenuous exertions of the friends of the proposed Constitution, in triumphantly showing that this power of removal made him subservient to Congress, that the public mind became reconciled, and the Constitution was finally accepted by the people. They seemed even then to well understand their rights. The great danger attending the appointing power was perceived. Then, as now, the people feared the enormous

patronage of the Executive if left unrestricted, and they appreciated the fact so patent to-day, that lust for power would be likely to corrupt officials and cause them to

> —— Crook the pregnant hinges of the knee,
> Where thrift might follow fawning.

Hence, as was thought, "effective measures of keeping officials virtuous whilst they continue to hold their public trusts" were interposed by making the appointing power a dependency upon the Senate. However we may guard this power, it will ever be liable to be made a source of corruption. Office will be the bribe held out by unprincipled Executives; and at all times there will be found men base enough to accept that bribe. This evil is unavoidable, and to save the nation, as far as possible, from this curse, is appointment made a joint power. The second clause of section 2, Article II, of the Constitution, says:

> He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for.

No shadow of authority is here given to the President alone to appoint any officer whatever, not even the most inferior, except as invested with power by Congress; on the contrary, it is made a joint act of the President *and Senate*. And why was this made a joint power? In order to protect public interests, to prevent a vicious Executive from displacing faithful officers and supplanting them with his own tools and confederates; to prevent the consummation of just such a conspiracy as was conceived by the respondent to obtain possession of all departments of government, and to use the power thus obtained against the people, even if it involved another great national strife and appeal to arms. But whatever may have been the reasons which led to this being made a co-operative power of the President and Senate, the *fact* that it is thus made stands uncontroverted, and cannot be explained away. Words have lost their meaning if other construction be put upon it. I wish, however, to direct attention to the remarkable connection of the appointing with another, the treaty-making power. Manifestly the framers of the Constitution had some object in thus blending the two powers; and the reasons given for making the President and Senate parties to treaties apply with equal force to the appointing power. Both the Senate and President are necessary to make a treaty; and in the same sentence, the same parties are made the appointing power. Reckless of his acts as has been the respondent in this case, and regardless as he has proved of the Constitution, he has never yet dared to assume to be the sole treaty-making power in this government; that, without the concurrence of the Senate, he can conclude treaties and annul them. Sirs, under the Constitution, the treaty-making and appointing powers are identical; the same parties that make treaties make appointments; the President and Senate are both as essential in perfecting appointments as in making a treaty. And happy for the American people is this so, or would we again have the din of battle ringing in our ears, and war once more sweeping over the land.

Human genius has not yet been able to frame a rule for government in which all the powers are so perfectly defined and balanced as to be literally equal. Our own Constitution more nearly approaches such a form than any other that has been given to the world; but even in this instrument, framed by the wisest patriots of the age, one branch in the government is made superior to the others. This superiority follows from the nature of the duties with which each branch is intrusted, and the necessity of some controlling influence—the exponent of the people's will—in order to check usurpations and correct abuses, which in a republic are likely to arise in departments not directly responsible to the people. The grand object to be attained by our Constitution was the consolidation of

the several States into one nation, by such a compact as would secure "the greatest good to the greatest number." It was to be a government *of* the people, *for the people*. The experience of ages had shown the necessity of a division of powers, and that one of these powers should possess an influence superior to that of the others; but no one power was made supreme or wholly independent of its cotemporaries. The judiciary is eminently "conservative" in its character; it is dependent upon the executive and legislative for its existence and perpetuity, is without creative authority, and its duties are mainly those of an advisory character.

That controlling influence in this great trinity of powers which form our government is the people, acting through their chosen representatives in Congress assembled. Even the most casual reader of the Constitution must see that such was the intent of its framers, from the wide range of authority delegated—even to regulating the executive and judiciary.

The Constitution lays down this great fundamental principle; "All power is derived from the people." Congress is the only branch in our government chosen directly from and by the people. The frequency of elections enables the people to change or ratify any policy that Congress may adopt, by retiring its members or indorsing their acts by re-election. This makes the legislative the mouthpiece of the people; to the people alone is Congress responsible, and it is through Congress the people are immediately represented in the government. The magnitude of the duties assigned to the legislative, and the authority given that branch over the executive and judiciary, aside from the imperative necessity, fully sustain the assumption that the legislative is the superior power in the three departments of government mentioned in our Constitution. Indeed, upon no other theory could the government be sustained. This control of the people in their government is the great feature in republicanism; this power of the many is the distinctive character of our Constitution. While the power of the executive is qualified and restricted by the legislative, the authority of the latter is uncontrolled by any other department. It makes and unmakes; it removes presidents, judges, and other civil officers who may be guilty of high crimes and misdemeanors, and sweeps away all obstacles in the way of the nation's advancement and prosperity, and from its verdict, in a case of trial as this, there is no appeal.

A further examination of section two, article II, will disclose a peculiarity of expression which is important. "He shall nominate, and, by and with the advice and consent of the Senate, shall appoint * * all officers," &c. The very first step in the matter of appointment is by the Constitution given to the President to "nominate." The appointment is still inchoate. The next step is the concurrence of the Senate, and this completes the ceremony of appointment. It then becomes the duty of the President to issue the commission. In the case of Marbury *vs.* Madison (1 Cranch, 137-156) it was distinctly affirmed in the opinion of the Court that the President could not withhold a commission from an officer nominated and confirmed. (See, also, Story on the Constitution, section 1537.) It is the essence of all contracts or matters in which two or more are to act, that their minds must meet and concur, and when this is done the act is complete, and is thenceforward beyond the control of one without the consent of the other. But note again, the Constitution does not confer the power on the President to "appoint." His power is to "nominate," and when the Senate concur, and not till then, is he empowered to "appoint;" and in doing this he merely carries out the previously determined wish of both parties to the appointment. In Marbury *vs.* Madison the court says, to "appoint and commission are not one and the same thing."

In the United States *vs.* LeBaron, 19 Howard, 74, the court says, the commission is not necessarily the appointment, although conclusive evidence of the fact. It would have been the simplest thing to have stripped this ques-

tion of all doubt when the Constitution was framed, had there been a disposition to confer the authority upon the executive, here claimed in the defence. We know that the very matter now before this honorable body was discussed then, so that it cannot now be said we are called upon to decide new questions. By what right, then, or upon what principle of construction can you interpolate language into the Constitution, or give the language already there a meaning contrary to its letter?

Mr. Sedgwick, in his work on Construction, says:

> Where there is no obscurity in the effect of the laws, and the object aimed at by the legislature, we are not permitted to inquire into motives of the legislature, in order to defeat the law itself, *afortiori* any law subsequently passed on the same subject. (Sedgwick, p. 295; Dunn *vs* Reid; 10 Peter, 524.)

If this is true of statutes, it is much more a just rule in searching for the meaning of a fundamental law. I insist that the Constitution is perfectly clear and unambiguous upon the subject of appointment. There should be no division of opinion on this one point, it does seem to me. Attorney General Legare says:

> The people, however, were wisely jealous of this great power of appointing the agents of the executive department, and chose to restrain it by requiring it in all cases to *nominate*; but only in case it had the concurrence of the Senate to appoint. (3d Opinions, p. 675.)

But let us look further into this section. I have already alluded to the matter, but will repeat it in this connection. The language is: "But the Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone." Now, sirs, there is a familiar maxim—"*expressio unius est exclusio alterius*"—which here prevails. The President is, by this clause, empowered to appoint such inferior officers as Congress may by law direct. Is it too much to urge that, by naming these particularly, and no others, it was intended he should alone appoint no others? But, sirs, even the maximum of the law need not here be invoked. The Constitution not only expresses one, and thus excludes others, but it expresses all—*i. e.*, it provides for the appointment of all officers of the government, and prescribes the manner of appointment in this section. First, it gives the President and the Senate the power to appoint a certain class; and second, it gives Congress power to allow the President alone, the courts of law, or the heads of departments, to appoint certain others; and these cover the whole range of officers of the government; and, to my mind, it is the wildest reasoning that can vault itself into the position claimed by the respondent.

Chief Justice Best, in 5th Bingham, p. 180, gives a rule directly applicable here:

> Where a general intention is expressed, and the act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered an exception.

The general intention of the framers of the Constitution was to make the appointing power joint with the President and Senate, and the exception only makes more imperative the general intention.

The inconvenience of uniting these powers in the multitude of minor officers made the exception necessary, but the general intention was only the more distinctly asserted.

But this power of removal, as implied from the power of appointment, is further shown to rest in the Senate and the President conjointly, by the adoption of the third section of the second article, which provides that

> The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions, which shall expire at the end of the next session.

Mr. Wirt says, "The meaning of the Constitution seems to me to result in this: that the President alone cannot make a permanent appointment to those offices; that to render the appointment permanent it must receive the consent of the Senate; but that whenever a vacancy shall exist which the public interests require

should be immediately filled, and in filling which the advice and consent of the Senate cannot be immediately asked, because of their recess, the President shall have power of filling it by an appointment which shall continue only until the Senate shall have passed upon it; or, in the language of the Constitution, "till the end of the next session."

I am not here discussing the question of vacancies and the power to fill them under the Constitution, but I desire to show that this particular clause of the Constitution now being noticed furnishes strong and direct evidence that the appointing power was intended to be kept undivided in the Senate and President, except in those cases where the two could not from some uncontrollable necessity act at the time. Hence we find Mr. Story holding what I think to be the undisputed construction of the clause, that "if the Senate are in session when offices are created by law, and nominations are not made to them by the President, he cannot appoint to such offices during the recess of the Senate, because a vacancy does not happen during the recess of the Senate. In many instances where offices are created by law, special power is on this very account given to the President to fill them during the recess; and it was then said that in no other instances had the President filled such vacant offices without the special authority of law." (2 Story, 1559.)

This author says again, in paragraph 1557: "There was but one of two courses to be adopted: either that the Senate should perpetually be in session, in order to provide for the appointment of officers, or that the President should be authorized to make temporary appointments during the recess, which should expire when the Senate should have had an opportunity to act on the subject."

This distinction between temporary and permanent appointments is recognized in the case of the United States *vs* Kirkpatrick, 9 Wheaton, 720. The independent action of the President, in violation of the wishes of the Senate, seems not to have been anticipated. In a long list of casualties given by Mr. Wirt, in the opinion referred to, he had in mind only those causes which could not be foreseen as preventing the co-operation of the Senate.

It has been uniformly held that if vacancies are known to exist during the session of the Senate, and nominations are not then made, they cannot be filled by Executive appointment during a recess of the Senate. (4 Opinions, 362.) This would not be true if it were unimportant whether the Senate participated in the appointment.

It is urged here that the President not only has the power to appoint, but that, having that power, he may also remove, as a necessary incident. I will admit, that if it can be shown that the President may alone appoint to office, then if the tenure of the office is not fixed, but remains at the pleasure of the President, he may unquestionably remove that officer. But, sir, I shall show hereafter that the doctrine of incidental power goes no further than to extend to the President when he alone has the appointing power. I deny that the President anywhere has that power, save when conferred by Congress as prescribed by the Constitution. Besides, Mr. President, I assert that, prior to the opinion rendered by the late Attorney General, there can be nowhere found an authority going so far as did that learned gentleman. What says history upon this subject? Hamilton said, in No. 77 of the Federalist:

It has been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace, as well as appoint. The change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected if he were the sole disposer of offices. When a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that the discountenance of the Senate might frustrate the attempt and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body which,

from the greater permanency of its own composition, will, in all probability, be less subject to inconstancy than any other member of the government. To this union of the Senate with the President in the article of appointments, it has, in some cases, been objected that it would serve to give the President an *undue influence over the Senate;* because the Senate would have the power of *restraining* him. This is an absurdity in terms. It cannot admit of doubt that the entire power of appointment would enable him much more effectually to establish a dangerous empire over that body, than a mere power of nomination, subject to their control.

Mr. Hamilton then proceeds to review, in a masterly manner, the structure and power of the executive department, and in conclusion refers to the many restraints thrown around the Executive, and, speaking to this matter of appointing power, says: "In the only instance in which the abuse of the executive authority was materially to be feared, the Chief Magistrate would, by that plan, (speaking of the constitution,) be subjected to the control of a branch of the legislative body," and asks: "What more can an enlightened and reasonable people desire?"

In No. 76 of the Federalist the writer examines, at more length, the reasons which led to the adoption of this joint plan of appointment, instead of conferring the entire power upon the President; and he shows that the power given to the President was solely to *nominate,* while the President and Senate *appoint.* He shows that as the President must first nominate, he can always, even if the Senate reject, send back the name of some one of his choice; and this should satisfy those who insist upon giving supreme power of appointment to the Executive. He then asks:

To what purpose, then, require co-operation of the Senate? I answer that the necessity of the concurrence would have a powerful, though in general silent, operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in an administration. * * It will readily be comprehended that a man who had himself the sole disposition of offices would be governed much more by his private inclinations and interests than when he was bound to submit the propriety of his choice to the decision and determination of a different and independent body, and that body an entire branch of the legislature.

Now, sirs, I aver that at the time Hamilton wrote, it will be found in this matter he expressed not only his own views but the views of the people who adopted the Constitution.

Mr. Madison at this time entertained no other view, and his opinions had a large influence upon the people, and contributed, probably, more than those of any other one public man in bringing about the adoption of the Constitution. In No. 47 of the Federalist he argues at length to show that the maxim of Montesquieu, which requires a separation of the departments of power to secure liberty, is not true, and has not been without exception in any government other than an absolute monarchy. He then shows that by the British constitution the departments of government are not distinctive, but that one branch of the legislative forms, like our Senate, a great constitutional council to the chief executive; it is the sole depository of judicial power in impeachment, and is the supreme appellate jurisdiction in other cases. And the judges are so far connected with the legislative as to attend and participate in the deliberations, though not to vote.

Mr. Madison then shows that, notwithstanding the unqualified terms in which the axiom of Montesquieu is laid down by the Constitution of the States of the Confederation, there was not a single instance in which the several departments of power have been kept absolutely separate and distinct.

In New Hampshire the senate had the right of trial by impeachment. The president, who was the head of the executive department, was the presiding member of the senate, and had a casting vote. The legislature elected the executive, and his council were chosen from the legislature. Some State officers were appointed by the legislature, while the judiciary were appointed by the executive.

Digitized by Google

In Massachusetts the judiciary were appointed by the executive, and were removable by him on an address of the two branches of the legislature. Many officers of the State (some of them executive) were appointed by the legislature.

He passes over Rhode Island and Connecticut, as their constitutions were adopted before the Revolution, and before the principles under examination had become an object of attention.

In New York the powers of government were curiously blended. The executive had a partial control over the legislative, and a like control over the judiciary, and even blended the executive and judiciary in the exercise of this control. There was a council of appointment composed of the executive and partly of the legislative, which appointed both executive and judicial officers.

New Jersey blended the powers of government more than either of the foregoing. The governor, who was the executive, was appointed by the legislature, and yet he was not only the executive, but he was chancellor and surrogate of the State; he was a member of the supreme court of appeals and president, with a casting vote, of one of the legislative branches. This same legislative branch acted again as executive council of the governor, and with him constituted the court of appeals. The judiciary were appointed by the legislature.

Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, all had the same system of blended powers. In some of them even justices of the peace were appointed by the legislature.

It is scarcely possible to find anywhere in contemporary history a stronger proof of the jealousy with which the people clung to their right to control their own political affairs; and it was a great concession of the States of the Confederacy to the Union under the Constitution when they assented to the clause now being considered. In every State of the confederacy, at the time they were called upon to adopt the Constitution, the people, through the legislatures, not only made the laws, but they appointed the officers who were to execute them; and not only this, but provided for their removal in the same manner. They seemed to have regarded the chief executive as an officer designated to assist the execution of the laws, but that it was unsafe to give him power to appoint those who were to co-operate with him in this duty.

I say it was a great concession, and a radical change which conferred upon the President of the United States even the prerogatives which are now undisputed.

Sirs, the people who adopted the Constitution were unaccustomed to looking upon their Executives as standing high above them and distributing the powers which they alone possessed. They had never been in the habit of clothing them with imperial powers, or permitting them to suppose for a moment that they were a distinct and separate entity of government. They had never, in a single instance, given to a State executive a distinct existence, separate from the legislative and judicial departments. He always acted conjointly, and upon the question of appointments to and removal from office, more than upon any other, they seemed to have been cautious.

With the light of this history, it is monstrous to suppose that the people parted with their power, as is claimed by the respondent, in adopting the article under discussion, that they gave up without a word of dissent all those checks upon the Executive with which they had been so familiar, and which they had so uniformly adopted in their State governments.

They did no such thing, Mr. President, and nowhere can it be shown they intended any such thing. On the contrary, we have seen that this clause of the Constitution was urged upon them for the very reason that it practically secured to them a system with which they had been so long familiar. The debates at that time show that the Constitution was adopted under the impression that this clause gave the power of appointment and removal jointly to the Senate

Digitized by Google

and President, and they show, too, that the clause was framed to meet this view. I say, then, it is unwarrantable, upon any principle of constitutional or statutory construction, to give the instrument any other meaning.

As well might you annul an ordinary contract upon declarations given after it is signed. The most that can be shown is what the parties said at the time it was made, and the written compact is conclusive of the meaning expressed. We have seen how the people felt at the time. We have seen what two great writers upon the subject said at the time, and that their opinions influenced largely the adoption of the Constitution. Upon the question under discussion at that time there seemed but one mind.

Mr. President, I think I do not state it too strongly in saying that prior to the meeting of the first Congress, and at the time the Constitution was adopted, none of the friends of the Constitution claimed the power for the President which is now urged. Some of its enemies made the charge, but it was denied by its friends. No man in this country has studied more carefully the history on the subject than Mr. Story. He says, in his Commentaries on the Constitution, (pages 15, 39, 40, 41,) that the doctrine (speaking of the same construction urged by the managers) was maintained, with great earnestness, by the earliest writers, and says that at this period the friends of the Constitution had no other view. He cites 5 Marshall's Life of Washington, chapter 3, page 198, and 1 Lloyd's Debates, 351, 366, 450.

Of the effect of these opinions upon the public mind at that time this writer says:

> This was the doctrine maintained, with great earnestness, by the federalists, and it had a most material tendency to quiet the just alarms of the overwhelming influence and arbitrary exercise of this prerogative of the Executive, which might prove fatal to the personal independence and freedom of opinion of public officers, as well as to the public liberties of the country. (Story's Commentaries, sec. 1539. Story on Constitution, vol. ii, page 400.)

I have been endeavoring to show that at the adoption of the Constitution the appointing power was regarded and made a joint power between the Senate and the President, as was also the power of removal. I think this position well established.

I have thus fully discussed the appointing power directly with the Senate because the same reasons that required that power to be joint apply with equal force to the power of removal.

Let us come down, however, to a period subsequent to the adoption of the Constitution.

Congress met March 4, 1789, and continued until September 29, of the same year. On the 27th of July they passed the act organizing the Department of Foreign Affairs, and on the 7th of August following was passed the act organizing the Department of War. These two acts are identical in language in every particular, except the assignment of duties to the different principal officers of the department. As much of the argument hinges on the law organizing the Department of War, at this time it is important to know just what was said and done at the time. There are some peculiarities of the law to which I invite attention.

Section one provides that—

> There shall be an executive department to be denominated the Department of War, and that there shall be a principal officer therein, to be called the Secretary for the Department of War, who shall perform and execute such duties as shall from time to time be enjoined upon him by the President of the United States, agreeably to the Constitution, relative to military commissions, or to the land or naval forces, ships or warlike stores of the United States, or to such other matters respecting military or naval affairs as the President of the United States shall assign to said department, or relative to the granting of lands to persons entitled thereto for military services rendered to the United States, or relating to Indian affairs; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or direct.

Digitized by Google

SEC. 2. That there shall be in the said department an inferior officer, to be appointed by the said principal officer, to be employed therein as he shall deem proper, and to be called the chief clerk in the Department of War, and who, whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall during such vacancy have charge and custody of all records, books, and papers appertaining to the said department.

SEC. 3. The said principal officer, and every other person to be appointed or employed in the said department, shall, before he enters on the execution of his office or employment, take an oath or affirmation well and faithfully to execute the trust committed to him.

SEC. 4. The Secretary for the Department of War, to be appointed in consequence of this act, shall forthwith, after his appointment, be entitled to have the custody and charge of all records, books, and papers in the office of Secretary for the Department of War, heretofore established by the United States in Congress assembled.

It is noticeable that the law nowhere provides how or by whom the principal officer is to be appointed. The language of the law is, in the first section, "there shall be a principal officer;" in the third section, "that the said principal officer and every other person to be appointed or employed in said department," &c., shall take an oath, &c.; in section four, "that the Secretary for the Department of War, to be appointed in consequence of this act, shall, forthwith after his appointment, be entitled to have custody and charge of all records," &c. It has been uniformly held that where no provision is made in the law for the appointment of the officer, the appointment must be made by and with the advice and consent of the Senate. (6th Attorney Generals' Opinions, page 1.) This results necessarily from the language of the Constitution. No provision was made in the laws organizing either of the executive departments as to how the principal officers were to be appointed; they were, therefore, all appointed by and with the advice and consent of the Senate. Is it not fair to suppose the removal was to take place in the same manner? On the same day the War Department was created, Congress passed an act giving the President power expressed to remove the governor and other officers of the territory organized under the ordinance of 1787, and yet these officers were by the same act to be appointed by and with the advice and consent of the Senate. Is it probable that Congress would have made special provision for the exercise of power in one case, if they had supposed that power incident to the share the President took in the appointment? The act, it seems to me, clearly indicates that Congress regarded legislation necessary to confer the power, else it was needless to have legislated at all upon the subject.

But it is urged that the second section of the War Department act *does* confer this power, absolutely. I say not. The second section provides for the appointment, by the Secretary of War, of an inferior officer, to be called the "chief clerk," who, whenever the said principal officer (the Secretary) shall be removed by the President of the United States, or in any other case of vacancy, shall, during such vacancy, have charge, &c.

There is a marked difference of expression between the act I have referred to as passed upon the same day, and this. In the one, the absolute power of revoking commissions and removing is conferred; in the other, the expression, "whenever the said principal officer shall be removed from office by the President," &c. Now, sirs, I think that the utmost which can be claimed from this grant, is recognition of a qualified and limited power over the Secretary of War, in case his removal should become necessary at a time when by the exercise of it a vacancy would be made at a time when the Senate could not assist in filling it. Provision had to be made for this, as the discussions at the time show, and I think the language means nothing more than that the President was to exercise the same and no more power than would be conceded to him in the entire absence of any provision on the subject. This law did not take the case out of the constitutional limitation, and by no legal interpretation can it be held to do so.

When the bill for organizing the Department of Foreign Affairs was under

Digitized by Google

discussion, the original draft read "to be removed by the President." Upon this arose all the discussion which is chiefly relied upon by the counsel for the respondent. Whatever may or may not be proved by that discussion, one thing is observable, namely—the language of the first draft was materially changed, and, as finally adopted, left the question upon inference merely. Instead of declaring that this officer is removable by the President, in plain and unmistakable phrase, an equivocal expression was finally adopted, which it was thought would partially meet the views of the majority and yet decide nothing absolutely.

But let us notice for a moment this discussion of 1789. I am not inclined to underrate the value of that debate, but as forming any rule or guide for us I cannot give it great importance. The leading mind which controlled the removal party was that of Mr. Madison, and he it is known argued against his views expressed before the Constitution was adopted. Whether he began to have glimmering hopes of the presidency himself I will not say, but it certainly detracts from the value of his opinions to know that his views expressed after the Constitution was adopted were different from those entertained when he was urging its adoption. But, as I understand that discussion, the argument turned largely upon the necessity of this power resting somewhere at a time when there was a pressing emergency for its exercise.

The first proposition was made by Mr. Madison, that there be established an Executive Department, comprising the Departments of Foreign Affairs, of the War and of the Treasury, the chief officers thereof to be called Secretaries; to be nominated by the President and appointed by and with the advice and consent of the Senate, and "to be removable by the President." This resolution was finally made the basis for three separate bills, couched in similar language, creating the Department of Foreign Affairs, Department of the Treasury, and Department of War. The bill creating the Department of Foreign Affairs was first taken up, and gave rise to a long discussion. This bill was amended by inserting in the second article words implying the right of the President to remove the Secretary, and was subsequently amended by striking out of the first article the authority of the President to make such removals. This last amendment was carried by a vote of 31 ayes to 19 nays, and the bill, as amended, passed the House by a vote of 29 to 22. In the Senate the bill was carried by the casting vote of the Vice-President.

It is an easily understood principle that where two or more unite in an act they may delegate the authority in all to any one of the number, and this, we may say, was done inferentially by the vote I have noticed. But, sirs, the Senate has since spoken upon this very subject many times, as I shall show, and on every occasion in unmistakable condemnation of the principle laid down by the respondent.

When John Quincy Adams, in 1826, attempted to entangle the United States in an alliance with the new republics of South America, and to establish what was popularly termed the "Panama mission," this encroachment upon legislative prerogative was sturdily resisted; the Senate insisting upon its rights to the utmost, even to contending that when a new mission is created it creates a new office, which does not come under the class of vacancies, and therefore the President has no right to fill it by a temporary appointment.

Under every administration since the days of Monroe, we observe attempts by the Executive to monopolize the right of appointment, but in every instance these encroachments were resisted, the Senate successfully asserting its joint authority to appoint and remove. In the session of 1825–'26, warned by the attempted exercise of this assumed power by Mr. Adams in the case of the Panama mission, a select committee was appointed by the Senate, charged with an inquiry into the expediency of reducing Executive patronage; which committee reported six bills, intended to control and regulate different branches of

the public service and limit some exercises of Executive power. In one of the six bills, to secure in office faithful collectors and disbursers of the revenue, the President was required to report to Congress the causes for each removal. The section of the bill to that effect reads:

> That in all nominations made by the President to the Senate, to fill vacancies occasioned by an exercise of the President's power to remove from office, the fact of the removal shall be stated to the Senate at the same time that the nomination is made, with a statement of the reasons for which such officer may have been removed.

Benton says this was intended to operate as a restraint upon removals without cause, and "was a recognition of a principle essential to the proper exercise of the appointing power, and entirely consonant with Mr. Jefferson's idea of removals, but never admitted by any administration, nor enforced by the Senate against any one—always waiting the legal enactment. The opinion of nine such senators as composed the committee who proposed to legalize this principle, all of them democratic, and most of them aged and experienced, should stand for a persuasive reason why this principle should be legalized." (Benton's Thirty Years' View, vol. 1, chap. 29.)

During Jackson's administration this power of removal as claimed by the accused came before the Senate many times, and never but to receive a decided condemnation. Upon the breaking up of Jackson's first cabinet, Mr. Van Buren was nominated to the Senate as minister to England. His confirmation was opposed for several reasons, and among them it was charged that he introduced, as Jackson's Secretary of State, a system of proscription or removal for opinion's sake, and a formal motion was made by Mr. Holmes, of Maine, to raise a committee, with power to send for persons and papers, to inquire into the charges and report to the Senate. But this looked so much like an impeachment of the President that it was dropped. The same reasons for the rejection were urged, however. Among those who insisted upon the rejection for the reason I have stated, among others, were Clay, Webster, Clayton, Colonel Hayne, of South Carolina, Governor Moore, of Alabama, and not least on the list was Thomas Ewing, of Ohio. Van Buren was rejected, and the right of the Senate and the truth of the principle I now insist upon was vindicated.

During Jackson's second term the question came up before the Senate in a different form. The offices of bank directors to the United States Bank were about to be vacated by limitation of their term. Jackson desired the reappointment of, and accordingly nominated, the incumbents. The Senate, for their own reasons, rejected the nominees. Jackson then attempted to coerce the Senate into the appointment, and accordingly sent the same names back, intimating in his message that he would nominate no others. The nominations went to a committee, who reported a resolution recommending rejection, which was immediately adopted. The report was an able review of the power of the Senate, and concludes as follows:

> The Senate perceive, with regret, an intimation in the message that the President may no, see fit to send to the Senate the names of any other persons to be directors of the bank except those whose nominations have been already rejected. While the Senate will exercise its own rights according to its own views of duty, it will leave to the other officers of the government to decide for themselves on the manner they will perform their duties. The committee know no reasons why these offices should not be filled; or why, in this case, no further nominations should be made, after the Senate has exercised its unquestionable right of rejecting particular persons who have been nominated, any more than in other cases. The Senate will be ready at all times to receive and consider any such nominations as the President may present to it.

The Senate had condemned the assumption of the President in presuming to remove for opinion's sake, and here we have a condemnation of his attempt to perpetuate in office his own favorites against the wish of the Senate.

But Jackson persisted in putting the question to every conceivable test, and removed his Secretary of the Treasury (Mr. Duane) because he refused to do what he conceived to be a violation of the law and his duty in the removal of

the public deposits. This was during a vacation of the Senate. The late Chief Justice Taney was put in charge of the department, and at once carried out the plans of Jackson. Upon the assembling of Congress Mr. Clay introduced into the Senate two resolutions in relation to the matter. The first one was as follows:

That by dismissing the late Secretary of the Treasury, because he would not, contrary to his sense of his own duty, remove the money of the United States in deposit with the Bank of the United States and its branches, in conformity with the President's opinion, and by appointing his successor, to effect such removal, which has been done, the President has assumed the exercise of a power over the treasury of the United States not granted to him by the Constitution and laws, and dangerous to the liberties of the people.

The resolution was adopted by a vote of 28 to 18.

Jackson held the nomination of Taney as Secretary of the Treasury in his pocket until the last week of the session of Congress; but it was rejected as soon as sent to the Senate. An acceptable name was afterwards presented, and the matter ended.

The next expression of the Senate upon the power of the President to remove a cabinet minister was even more decided in its condemnation of the false doctrine derived from the debate of 1789. I refer, sir, to the passage of the tenure-of office act over the veto, and of course by two-thirds of both houses of Congress, on March 2, 1867. Both Senate and House here united in this expression; and in this they spoke for every representative element of this government and for the whole people.

Need I add to this chain of uniform decision the last vote of the Senate given on the 21st day of February, within twelve hours after the respondent had made the attempt to remove Mr. Stanton?

It is plain to my mind that those who voted with the majority in 1789 were not understood to give license to wholesale and causeless removals by the President. And we have the very highest evidence of this, not only in the decisions of the Senate, which I have noticed, but in the uniform practice of the government throughout all administrations. I do not find that the first President ever exercised the power of removal, but if he did so, it will be seen, I venture to assert, that he consulted the Senate at the time or at its first session. I do find, however, an example of his great respect for, and deference to, that body which the Constitution had made his aid in making appointments.

Less than a month after the bill had passed organizing the Department of Foreign Affairs, he sent to the Senate the name of Benjamin Fishbourne, as naval officer at the port of Savannah. The Senate rejected the nomination. The President, fearing that in this there might be some misconception of his motives, sent another name, but gave his reasons in justification for nominating Colonel Fishbourne.

When John Adams desired to displace Mr. Pickering, his Secretary of State, and appoint another, he notified the incumbent that he would, on a certain day, cease to be Secretary of State. Meanwhile the Senate being in session he sent in the nomination of John Marshall, who was confirmed, and thus Mr. Pickering was removed, not by the President under any power the law gave, but under the Constitution and by virtue of the power incident to the appointing power vesting in the Senate and the President. This is a very striking and practical illustration of the doctrine then supposed to be the true one, and it was but following out the true spirit of the opinions expressed in the great debate of 1789.

Jefferson, the President who initiated the practice of removals, and was the first to confine his favors to his own party, made it a fundamental principle that removals were only to be made *for cause*. March 7, 1807, only three days after his induction into office, he writes to Mr. Monroe:

Some removals, I know, must be made. They must be as few as possible, done gradually, and bottomed on some malversation or inherent disqualification.

Digitized by Google

On the 23d of the same month he thus writes to the governor of Virginia, Mr. Giles:

> Good men, to whom there is no objection but a difference of political opinion, practiced only so far as the right of a private citizen will justify, are not proper subjects of removal.

Six days after he writes to Eldridge Gerry, afterwards Vice-President:

> Mr. Adams's last appointments, when he knew he was appointing counsellors and aids for me, not for himself, I set aside as fast as depends on me. Officers who have been guilty of gross abuse of office, such as marshals packing juries, &c., I shall now remove, as my predecessor ought in justice to have done. The instances will be few, and governed by strict rule, and not party passion. The right of opinion shall suffer no invasion from me.

How, sir, did Mr. Jefferson proceed to displace incompetent or untrustworthy officers? If there was a vacation of the Senate he appointed successors and gave notice to the incumbent of his action. The successor then became the legal officer, and the incumbent was removed by virtue of the new appointment working a revocation of the old commission. If the Senate was in session when this transpired he sent the nominations to that body, and their concurrence in the new appointment worked the revocation. If the Senate was not in session at the time he sent the nominations to that body at its next meeting, and the confirmation concluded the appointment, its action being an order or approval *nunc pro tunc*. And this has been true of every administration except the present one. I ask counsel for the respondent to show a single removal from office by any President that was ever held of legal force that was not at the time or at a subsequent date approved by the Senate. When this is done the spirit and the letter of the Constitution are met, and when it is not done both are violated. Jefferson did not create vacancies. In making new appointments he rewarded his friends, and for cause he displaced incompetent men by appointing successors, but his action was always subject to review by the Senate. The Supreme Court said upon this point in *ex parte* Hennen: "The removal takes place in virtue of the new appointment by mere operation of law." Not the mere nomination, but the appointment.

Mr. Madison's administration will be searched in vain to find an instance where he ran counter to the will of the Senate in this matter of removals and appointments. In every instance where changes were made the Senate legalized them if they were appointments coming within the first clause of the second section, article second, of the Constitution.

I do not find that any occasion arose in Mr. Monroe's administration to present the question. I have elsewhere noticed the opinion of his Attorney General, William Wirt, upon the duties of the President in relation to the execution of laws which by their terms are to be executed by officers named in the law. This opinion completely overthrows the assumption of this respondent.

John Quincy Adams succeeded Mr. Monroe. There was no occasion for removals for political causes at this time. There was no revolution of parties. Mr. Adams had occupied the first place in Mr. Monroe's cabinet during the whole term of eight years, and stood in concurrence with his appointments. It was called "the era of good feeling." It will be found that he made no change in offices filled by nomination to the Senate which were not concurred in by that body.

When Jackson came in there was an entire political revolution in the country. He formed his cabinet, as all other Presidents had done, by nomination to the Senate. He displaced officials by nominating successors when the Senate was in session, or issuing commissions during vacation, which stood or fell as the first Senate thereafter decided. We have already seen how quickly the Senate brought this President to account for his first usurpation in the matter of removals when he removed Mr. Duane from the Treasury, although it was done during vacation.

Digitized by Google

Van Buren succeeded Jackson, and nowhere can I find that he violated the general practice of filling appointments and making removals.

Harrison's administration presents another instance of a complete revolution in party power. President Harrison in no instance ran counter to the Senate or made removals or appointments which were without the Senate's concurrence. Mr. Tyler, who succeeded him but a month after his inauguration, was so impressed with the history of Jackson's attempted usurpation that he made this very subject the occasion for remark in his inaugural message. He said:

In view of the fact, well avouched in history, that the tendency of all human institutions is to concentrate power in the hands of a single man, and that their ultimate downfall has proceeded from this cause, I deem it to be of the most essential importance that a complete separation should take place between the sword and the purse. No matter where or how the public moneys shall be deposited, so long as the President can exert the power of appointing and removing at his pleasure the agents selected for their custody, the Commander-in chief of the army and navy is, in fact, the Treasurer. A permanent and radical change should therefore be decreed. The patronage incidental to the presidential office, already great, is constantly increasing. Such increase is destined to keep pace with the growth of our population, until, without a figure of speech, an army of office-holders may be spread over the land. The unrestrained power exerted by a selfishly ambitious man, in order either to perpetuate his authority or to hand it over to some favorite as his successor, may lead to the employment of all the means within his control to accomplish his object. The right to remove from office, while subjected to no just restraint, is inevitably destined to produce a spirit of crouching servility with the official corps, which, in order to uphold the hand which feeds them, would lead to direct and active interference with elections, both State and federal, thereby subjecting the course of State legislation to the dictation of the chief executive officer and making the will of that officer absolute and supreme.

When subsequently he found himself at variance with his cabinet, instead of removing them he caused scandalous things to be written and published of them in public newspapers, and revealed the cabinet consultations, which were published in the same way, thus making the position of the cabinet so unpleasant that they resigned. What I now state is alluded to in Mr. Ewing's letter of resignation. (Benton's Thirty-year View, p. 353.)

I will not pursue the history of removals and appointments in subsequent administrations, but I assert that there will not be found in the practice pursued in any of them the slightest warrant for overriding the Senate either in appointments or removals without authority of law.

It is well understood that immediately upon the inauguration of a President the Senate is called together in extra session and at once go into executive session to consider any new appointments to be made. Cabinet changes are then made and submitted. If the President could remove and appoint without them such proceeding would be useless. Indeed, the President, having in mind the selection of a cabinet he had reason to believe would be rejected by the Senate, would accomplish his purpose by withholding all nominations until the Senate adjourned, and thus defeat the very purpose of the Constitution in requiring the concurrence of the Senate.

Much weight has been attached to the judicial decisions upon the power of removal. A close scrutiny of these will show that they do not decide the question here discussed.

The opinion of the Supreme Court in *ex parte* Hennen establishes this simple proposition and no other, viz: The power of removal, in the absence of all constitutional or statutory regulation, is incident to the power of appointment. Hennen was appointed clerk of a court in Louisiana. The law creating the court gave the judge the power to appoint the clerk, but was silent as to how he might be removed. The judge removed Hennen. The Supreme Court of the United States held, on appeal, that the power of removal was incident to the power of appointment, and sustained the judge of the court accordingly. The court, in remarking upon the clause of the Constitution under discussion, remark:

No one denied the power of the President and Senate, jointly, to remove where the tenure

Digitized by Google

of the office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment.

Any lawyer will see that this is all the court was called upon to say, and in going beyond this to discuss what had been the opinions expressed in the first Congress was mere *dictum*, and is not to be considered as judicial interpretation. It is no new thing for courts to go outside of the case before them, and the Supreme Court is not an exception. There is not, Mr. President, as no one knows better than yourself, a single decision recorded in the Supreme Court reports, where the power of the President to remove from office in violation of the expressed wish of the Senate was drawn in question. Trace the history of all removals by the President down to the present time, and there will be found no instance where a removal has been made to which the Senate has not made the act its own, expressly or impliedly, by confirming the successor to the office made vacant by removal, and this, sir, takes all decided cases out of this discussion.

What we claim is that the Senate must either be first consulted in the removal, or it must subsequently to the removal assent thereto.

In Marbury *vs.* Madison, (1 Cranch,) the power of the President to remove was not directly made a question. Marbury was nominated a justice of the peace for the District of Columbia, under a law which fixed the tenure of his office at four years. The Senate had concurred in the nomination, and the commission was signed by the President but not yet delivered. Mr. Madison, the Secretary of State, refused to deliver it, and a mandamus was sued out to compel him to do so. The court decided that a mandamus could not lie against the head of an executive department. Upon the right of Marbury to his commission, however, the court said:

Some point of time must be taken when the power of the Executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power has been performed.

By the act of 1789, creating the Department of Foreign Affairs, it was made the duty of the Secretary of that department to affix the seal of the United States to all commissions signed by the President. Upon the point as to whether the President could arrest the commission here the court said:

This is not a proceeding which may be varied if the judgment of the Executive shall suggest one more eligible; *but is a precise course, accurately marked out by law*, and is to be *strictly pursued*. It is the duty of the Secretary of State to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts under the authority of the law, and not by the instructions of the President.

If that case bears upon this, it goes only to show that the President cannot interfere with the due progress of the law, under the assumption that he is Chief Executive, and therefore possessed of power to control all executive offices.

If there are any decisions of the Supreme Court directly in point they have escaped me. I assume there are none, for the respondent states that he was governed in his action mainly to make a case for the courts, in order to obtain a judicial decision. For the first time in our history have we a direct issue between the two appointing powers. For the first time have we a case where the Senate, refusing to concur in a removal, the President ignores that body and defies its expressed will, and that, too, in the face of a positive enactment.

Sirs, I contend that the Department of War to-day, of which Edwin M. Stanton is Secretary, is not the Department of War of which Henry Knox was Secretary under George Washington. I have shown that by the act of 1789 the law simply created the department, but assigned no duties to it except such as might suggest themselves as necessary to the President.

The department remained thus, without any duties imposed upon it by law,

Google

and without any legislation recognizing its importance or its distinctiveness, until May 8, 1798. Meanwhile, the duties pertaining to the navy had been taken from the War Department and conferred on a separate department; Congress had given the power to make contracts for war and navy materials to the Secretary of the Treasury.

By the act of July 16, 1798, it was provided that all contracts and all purchases for the military service should be made by direction of the Secretary of War. The law also made it the duty of the public purveyor, who was an important officer and responsible for large sums of money, to report to the Secretary of War. The change here may seem unimportant, but it marks the beginning of that emancipation of the War Department from the manacles of executive control, which is now by law made so complete.

The subsequent laws organizing the pay department, the quartermaster and commissary departments, the engineer and ordnance corps, all recognize the Secretary of War as in many respects the chief and sole executive officer for the discharge of specific duties, with which the President had nothing whatever to do.

Still later, in 1812, when an army was raised to meet the apprehended war with Great Britain, greater powers were conferred on the Secretary of War. In the Indian wars, in the war with Mexico, and especially in the late war against rebellion, Congress seemed to have treated the Secretary of War as the only executive officer with whom they had anything to do, so far as that Department was concerned, and the legislation does not in many instances recognize the existence of a chief executive—so great and powerful an engine of government had the War Department become. Resolutions of inquiry for information in relation to military affairs were all directed to the Secretary of War, and he made answer to Congress himself, without consultation with the President. The entire and immense system of purchase and supplies for the army, the organization and equipment of troops, the moving of troops and military supplies, the sequestration of the enemy's property, the entire internal management of army affairs, the payment and disbursement of millions of dollars annually, the adjustment of numberless claims against the government, are all by law imposed upon the Secretary of War. Indeed, the War Department has, by virtue of laws passed since 1789, been completely changed, and instead of being a mere appendage to the Executive office, with an amanuensis in it to write what the President might dictate, it is now, next to the Treasury, the most powerful and important department of the government.

Take up the statute-books and compare the laws as they now stand, and as they stood when Congress spoke the department into existence by four short sections in the act of 1789. You will find that there is scarcely a vestige of the act of 1789 left in force. That made the Department of War a part of the Executive office, with its whole control in the President. The laws now place the specific duties of that vast department in the hands of the Secretary, and hold him alone responsible. The very necessities of our national growth have wrought this change, and the people have come to hold the President no longer responsible, as they once did, for the conduct of the executive departments. Any one who, during the late war, had occasion to appeal from Mr. Stanton's decision in matters appertaining to his legal functions, knows that what I state was recognized by the President as true.

This, too, has been recognized by judicial decision. The President has no right to perform executive acts by law given to his Secretaries. He had this right in 1789, because the law made them the executors of his will, merely.

Can the President make a contract for the supply of the army or navy, which the courts would hold binding? Can he give legal effect to an act which the law requires a particular officer of the government to do? Can he step into the War, Treasury, or Navy Departments and sign official papers which the Sec-

Digitized by Google

retaries sign, and make his acts legal? If he is the chief and only controlling executive, why has not he cut the Gordian knot by taking the War Department reins into his own hands until the Senate shall confirm his nominees?

There can be no other safe view to take of this question—any other leads to despotism. In speaking of the executive departments during the great discussion upon President Jackson's removal of his Secretary of the Treasury, Mr. Clay said:

> We have established and designated offices, and appointed officers in each of these respective departments to execute the duties respectively allotted to them. The President, it is true, presides over the whole. Specific duties are often assigned by particular laws to him alone, or to other officers under his superintendence. His parental eye is presumed to survey the whole extent of the system in all its movements; but has he power to come into Congress and say such laws only shall you pass; to go into the courts and prescribe the decisions they may pronounce, or even to enter the offices of administration, and where duties are specially confided to those officers, to substitute his will to their duty? Or has he a right, when those functionaries, deliberating upon their own solemn obligations to the people, have moved forward in their assigned spheres, to arrest their lawful progress because they have dared to act contrary to his pleasure? No, sir. His is a high and glorious station, but it is one of observation and superintendence. It is to see that obstructions in the forward movement of government, unlawfully interposed, shall be abated by legitimate and competent means.

Will gentlemen consider for a moment the tremendous consequences of the doctrine claimed by this respondent? If, sirs, this Senate concede the power arrogated to the President, he is henceforward the government. Even Congress is powerless to arrest his despotic rule.

Suppose he desired to force upon the country a certain policy, and chose the Secretary of the Treasury, with his immense power, for his instrument. That officer might decline to execute the President's will, and claim that the law conferred upon him alone certain specific duties which he could not conscientiously abandon to the dictates of the President. The remedy is at hand, and the official guillotine commences its work. An obsequious tool of the Executive is placed at the head of the Treasury, and the Senate and the people are tied hand and foot. He may remove at any time. He may withhold the name of the appointee till the very close of an intervening Senate, and should the Senate reject, he may reappoint the same person, or another equally subservient. Indeed, sir, if the absolute power claimed is conceded, he may so arrange the appointment as to avoid submitting it at all to the Senate. Can it be possible that a power so tremendous in its consequences was ever intended?

If the Congress of the United States have no right by legislative enactment to fix the tenure to certain offices, and exercise their joint authority in appointments as well as removals from office, what restriction is there on the President's power?

If he can control the Treasury by this ingenious, not to say despotic, means, does his power end there? He may remove the Secretary of War and the General-in-chief, if they dare dispute his policy. He thus possesses himself of the purse of the nation, and next its army. Let me ask the learned counsel, if they be correct in claiming the inherent right of removal in the President, where is the authority that makes Sherman's, Sheridan's or Farragut's commissions more than blank parchment before the imperial throne at the White House? Under what authority can the Secretaries of the Navy, of State, Department of Interior, Postmaster General, and the thousands of officers of the several executive branches of government, scattered all over the land, shield themselves from the withering and corrupting touch of the Executive wand, when he chooses to command their removal?

If the President can do these things with impunity, let me ask if we have not that state of government forewarned by Mr. Seward's question, Will you have Andrew Johnson President or King?

We hear much said about the so-called cabinet council of the President. The heads of executive departments have become cabinet ministers, who hover around

their chief as aids to a general of the army, and the argument is used that you might with the same propriety force an obnoxious aid upon a general, as an obnoxious cabinet minister upon the President. Sirs, what is the origin of cabinet councils, and whence comes the appellation cabinet minister? I do not find them anywhere in the law which organized the several departments. Let us not be deceived by names. I know of no authority for convening cabinet conclaves semi-weekly, and I fear, these councils are cabals in which the public weal is much less discussed than the party weal.

Tell me why the Postmaster General need be called to consult as to how the Navy Department should be administered; and what necessary connection is there between the duties of the Attorney General as prescribed by law, and those appertaining to the War Department? Sirs, the so-called cabinet councils are misleading us, and so far has this independent and self-constituted board of government directors counselled the accused that he sets up the difference existing between him and the Secretary of War as working their loss of the latter's counsel in this cabal, and from this he excuses his attempt to remove him. You are asked to give legal existence to this cabinet, and say the Secretary of War has duties to perform there, failing in which he must leave his department. This cabinet appendage to our executive government is an innovation, and should not be legalized.

The Constitution says the President "may require the opinion, in writing, of the principal officers of each of the executive departments *upon any subject relating to the duties of their respective offices.*"

But, sirs, it nowhere authorizes him to consolidate the heads of these departments into a cabal to discuss party politics, and devise ways to perpetuate their tenure by securing the re-election of their chief. There is danger in our forgetting that the law-making power of this government has imposed duties and obligations upon these heads of departments which they cannot delegate to the President, much less the cabinet, and which neither the President nor the cabinet can arrogate to themselves.

In this portion of the defence set up, I do not find that any breach of duty is charged to the Secretary of War. It does not appear that he has been derelict in anything enjoined upon him by law. No, sirs; he has ceased to be an agreeable companion to the President's cabinet tea-parties, and he must be decapitated. Under all this lies much of that evil growing out of the power arrogated to the President. Here is the seed of executive consolidation, of which the fathers had such dread. These secret meetings tend to destroy that independence of administration which the law contemplates. Napoleon used to say that councils of war never fought battles. I think, sirs, I may say that cabinet councils do not always execute laws.

I come now to notice the second branch of the offence involved in the first charge, viz:

HAD THE PRESIDENT POWER TO REMOVE THE SECRETARY OF WAR IN VIOLATION OF THE TENURE-OF-OFFICE ACT?

The first section of this act reads as follows:

That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been appointed by the President, with the advice and consent of the Senate, and duly qualified; and that the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General and the Attorney General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

It is urged by the accused, in order to evade the necessary consequences attending a violation of this act, first, that it is unconstitutional, and, second, that it does not reach Mr. Stanton's case.

Digitized by Google

The first of these points goes to the power of Congress to enact any law on the subject of tenure of office, while the second is a legal quibble upon the language of the law, which the respondent knows better than any one else is a plain violation of the spirit and intent, not to say letter of the act. Let us consider briefly these two points.

First: IS THE TENURE ACT CONSTITUTIONAL?

It would seem idle to discuss a question which, so far as this Senate is concerned, is *res adjudicata*. I am surprised, sirs, to find counsel of such eminence as those pleading for the accused coming before a court and rearguing with pretentious hopes of reversing a decision deliberately made by over two-thirds of this body. Would they thus presume before the Supreme Court of the United States? One of the counsel once sat upon that bench. Would he have tolerated an argument upon a decision of that court which had been rendered after repeated examinations by the most learned of the country, exhausting every phase of argument on both sides, and which decision was finally concurred in by two-thirds of the court?

But the question is before the Senate again; has been elaborately argued, and courtesy to the counsel for the respondent, if no other reason offers, would seem to require for it a passing notice.

I do not observe in the remarks of counsel any argument different from that given in the message vetoing the act of March 2, 1867. This did not prevail before the Senate then, and I see no reason why it should now. We are told there that the question arose and was settled in the discussion of 1789 when the War Department and Foreign Department were created. I think the question presented then is much misapprehended. It was not whether Congress had the power to legislate upon the subject. It was whether they ought to confer the power of removal on the President. If the power *inheres* in the President the act then passed was wholly gratuitous and unnecessary. To my mind the persistent determination with which the majority (and a small one it was) insisted upon putting into those acts of 1789 a clause impliedly giving the power of removal to the President, is the highest proof of their belief in the power of Congress to legislate upon the subject, and that without legislation the President would not possess the authority to remove. If Congress was competent to grant the power to the President are they not equally competent to withhold it?

The only officers of the government whose tenure is fixed by the Constitution are the President and Vice-President and the judges of the Supreme Court and such inferior courts as Congress may establish. (Articles 2 and 3.) The President and Vice-President hold for four years, but Congress may remove them by impeachment. The judges hold "during good behavior," but who can decide the good or bad behavior of judges except Congress? Congress can not abridge the tenure of the office, but they can abridge the officer's tenure by impeaching him.

This, sirs, is the only limitation upon Congress anywhere to be found in the Constitution upon the subject of controlling official tenure.

The Constitution is silent on the subject of tenure. I hold, therefore, that the whole power is vested in Congress to provide, whenever and however they choose, both for appointment to and removal from office. There is not an officer mentioned in the second clause of the second article over whom Congress has not control in such manner as they may by law provide, except in the cases mentioned.

Congress is perfectly competent to fix any tenure it deems best to ambassadors, ministers, consuls, or any other officers than those whose term of office is fixed by the Constitution. The section of the Constitution to which I have alluded only provides for the manner of appointment; it does not restrain Congress from giving a tenure to the offices which it establishes, and to impose such restraint by implication is wholly unwarrantable. Nothing but the method of appoint-

Digitized by Google

ment is attempted to be controlled. Suppose Congress should determine that the efficiency of our diplomatic system is greatly impaired by the frequent and causeless changes made among ministers, ambassadors, or consuls, and that the practice of putting spies upon them, and crediting such mythical men as McCracken, and recalling ministers upon their statements, should be stopped—could no law be passed fixing their tenure, requiring the President to advise with the Senate before recalling the minister, leaving us unrepresented abroad, except where he did so for good cause?

The object of the Constitution was to provide the means of filling offices which Congress might establish. No intention was expressed to control absolutely the tenure of the office, or prohibit Congress from prescribing means of removal.

If Congress cannot do more than make the office and prescribe the duties incumbent upon the person filling it, in the matter of those officers referred to in the first part of section second, article second, how can Congress do more, in the creating of inferior officers, spoken of in the last part of the section? It says, "Congress may vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments." Suppose Congress create a board of examiners to examine into the national banks, and give the President the power to appoint them. Congress has then exhausted all the directly conferred power given them by the letter of the Constitution, and they are powerless to fix the tenure here if they are in the other cases. The argument urged is that the power to remove is incident to the power to appoint. The President by law appoints, and therefore he alone can terminate the officer's tenure. Congress, by giving the President the power to appoint, is estopped from fixing the tenure, so as to control the President's removing prerogative. But, sirs, we know this is not true. The country is filled with officers, civil and military, some of them appointed by the President alone, others by and with the advice and consent of the Senate, and yet Congress, in these cases, has never been held to be powerless to fix the tenure.

Wherein is the difference between the Constitution saying the President and Senate may appoint certain officers created by law, or the Constitution saying Congress may provide means of filling certain offices? The will of the people is expressed in the same manner through the Constitution, directly to the President and Senate in one case, and indirectly to the President, to courts of law, or heads of departments in the other case, but in neither case do they say through the Constitution, directly or impliedly, that Congress, who create the office, shall not adjust its tenure. The reason for giving the appointment of inferior officers into other hands than the Senate and President was to provide for speedy execution of the law, and for early action in filling the offices. Inferior officers were of less importance; they were numerous; vacancies were constantly occurring, and hence the necessity of relieving the Senate and President from acting jointly. But the reason for giving Congress power to control the tenure of inferior offices applies with much greater weight in the case of higher officers, whose wanton and capricious removal may lead to infinitely more dangerous consequences.

If this view be correct, there can be nothing left of the argument against the constitutionality of the tenure act. In Marbury *vs.* Madison, the case of an officer appointed by the President and Senate is presented, where the law also fixed the tenure of the office at five years. In this case the court said:

> If the officer be removable *at the will of the President*, then a new appointment may be immediately made, and the rights of the officer terminated; if the officer is by law not removable at the will of the President, the rights the officer has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by the Executive.

Digitized by Google

This would be bad law if Congress were powerless to fix a tenure, and it is

no answer to say Congress may fix the number of years the officer is to serve, for if the term of years can be fixed, so can the manner of his removals.

If Congress can pass one step beyond the power to create the office and provide for filling it, then they can regulate the tenure in any and all particulars. The question cannot turn upon who are or who are not inferior officers, for here we would be left in a maze and labyrinth, and the President could shield himself behind a will-o'-the-wisp. The Constitution does not pretend to define who are or who are not inferior officers, and the fact that this is left undefined shows that the matter of controlling the tenure, by congressional enactment, of either the one or the other, was not the question the framers had in mind. It was much discussed in 1789 as to whether the heads of departments are inferior officers, and the result of the discussion is doubtful, and really settled nothing.* But whether they are or are not does not affect the question in hand. Because this appointment is to be by both Senate and President does not settle it, else every petty postmaster and collector in the country must be held to rank with ambassadors, ministers, and judges of the Supreme Court. What rule determines whether the General-in-chief and all subordinate military officers are or are not inferior officers? There is none. The army is a creature of law, and Congress has always regulated it as it chose. Some of its officers were placed under the control of the War Department; some minor ones even appointed by the Secretary. Others were nominated to and confirmed by the Senate. In point of fact, however, officers of the army are not regarded as inferior officers, yet Congress has regulated the whole army system, imposing restraints upon the President in many ways with regard to it. The question came up in Mr. Monroe's administration, and was discussed in his message of April 12, 1822. (1 Ex. Journal, 286.) The Senate disagreed with Mr. Monroe, and held that Congress had the right to fix the rule as to promotions and appointments as well as to reductions in the army, and that this right had, to that time, never been disputed by any President. It is true this was claimed under the general power to make all needful rules and regulations for the government of the army, but that clause of the Constitution confers no more executive control on Congress in respect to the army than does the clause which provides that Congress shall establish post offices and post roads over the manner of appointing postmasters.

Story says: (Sec. 1537,)

As far as Congress possesses the power to regulate and delegate the appointment of inferior officers, so far they may prescribe the term of office, the manner in which and the persons by whom the removal as well as the appointment to office may be made.

But, as we have seen the clause of the Constitution on this subject does not define who are inferior officers, and does not separate them from other officers with any view to give Congress greater control over their tenure than in other cases, we are brought back again to my position, that there is no restraint upon Congress to regulate the tenure in the one case more than the other.

The officers of the army then coming within the class titled superior, as distinguished from inferior, they are to be placed beside and are to rank with ambassadors, ministers, cabinet officers, &c., and if Congress is competent to control the tenure of the one, it is of the other. Unfortunately for the consistency of the respondent's special plea he is on the record against himself.

By the act of July 13, 1866, section five, it is provided that—

No officer in the military or naval service shall, in time of peace, be dismissed from service except upon, and in pursuance of, the sentence of a court-martial to that effect or in commutation therefor.

Here is a direct inroad upon the prerogative of the President, as now set up, and admits the whole principle here contended for. Where were the vigilant

*1 Lloyd's Debates, 480 to 600, Sargeant on Constitution, ch. 29, (ch. 31.) 2 Lloyd's Debates, 1 to 12.

advisers of the President when he approved the bill and made it law? Was there no genius of executive prerogatives near to whisper "Veto?" Was the facile logic of the law officer of the President reserving itself for this occasion?

But this principle of recognizing the *right* or *power* of Congress to legislate as to how an officer is to be displaced had the sanction of Mr. Lincoln in the act of February 25, 1863, creating the office of Comptroller of the Currency. It provides as follows:

He shall be appointed by the President, on the nomination of the Secretary of the Treasury, by and with the advice and consent of the Senate, and shall hold his office for the term of two years, unless sooner removed by the President, by and with the advice and consent of the Senate.

This is not a power recently claimed by Congress. I have shown in another part of the argument that many unsuccessful efforts were made at different periods of our national history to pass laws similar to the present tenure act, and they were supported by members of all shades of politics. The constitutionality of such laws was not questioned, but the bills always failed from executive influences brought to bear upon Congress. Mr. Benton was an earnest advocate of a tenure act limiting executive control over appointments and removals.

Mr. Clay and Mr. Webster have left upon the records of the Senate arguments not only showing the constitutionality of such laws, but giving the most weighty reasons for passing them upon the grounds of public policy and safety.

In 1835 a lengthy discussion occurred upon an amendment offered by Mr. Clay to a pending bill which embraced every principle of the present tenure act. I will be pardoned for giving a condensed statement of the view taken at that time by three senators who participated in the discussion, as giving briefly the whole argument upon this question. Mr. Clay supported his position by the following arguments, among others:

It is legislative authority which creates the office, defines its duties, and may prescribe its duration. I speak, of course, of offices not created by the Constitution, but the law. The office coming into existence by the will of Congress, the same will may provide how and in what manner the office and officer shall cease to exist. It may direct the conditions on which he shall hold the office, and when and how he shall be dismissed. Suppose the Constitution had omitted to prescribe the tenure of the judicial oath, could not Congress do it?

But the Constitution has not fixed the tenure of any subordinate officers, and therefore Congress may supply the omission. It would be unreasonable to contend that, although Congress, in pursuance of the public good, brings the office and the officer into being, and assigns their purposes, yet the President has a control over the officer which Congress cannot reach and regulate. * * The precedent of 1789 was established in the House of Representatives against the opinion of a large and able minority, and in the Senate by the casting vote of the Vice-President, John Adams. It is impossible to read the debate which it occasioned without being impressed with the conviction that the just confidence reposed in the father of his country, then at the head of the government, had great, if not decisive, influence in establishing it. It has never, prior to the commencement of the present administration, been submitted to the process of review. * * * No one can carefully examine the debate in the House of Representatives in 1789 without being struck with the superiority of the argument on the side of the minority, and the unsatisfactory nature of that of the majority.

Daniel Webster agreed with Mr. Clay in his position in the following language, used by him on the occasion:

I think, then, sir, that the power of appointment naturally and necessarily includes the power of removal, where no limitation is expressed, nor any tenure but that at will declared. The power of appointment being conferred on the President and Senate, I think the power of removal went along with it, and should have been regarded as a part of it, and exercised by the same hands. I think the legislature possesses the power of regulating the condition, duration, qualification, and tenure of office in all cases where the Constitution has made no express provision on the subject. I am, therefore, of opinion that it is competent for Congress to decide by law, as one qualification of the tenure of office, that the incumbent shall remain in place till the President shall remove him, for reasons to be stated to the Senate. And I am of opinion that this qualification, mild and gentle as it is, will have some effect in

arresting the evils which beset the progress of the government, and seriously threaten its future prosperity.

This view was sustained by the Hon. Thomas Ewing, of Ohio:

Mr. Ewing spoke at length upon the question of removals, maintaining that the Constitution does not confer on the President alone the power of removal; that it is a matter of legislative provision, subject to be vested, modified, changed, or taken away at their will; and if it is not regulated at all by law, it rests in the President, in conjunction with the Senate, as part of the appointing power.

The respondent cannot, I think, find support in any precedent or decision, or by any right construction of the Constitution. What, then, becomes of his reliance upon these in defence of his wilful violations of the act? He stands convicted by his own confession. Did he make a mistake in his research, and did he innocently misinterpret the Constitution? These mistakes and these innocent misinterpretations are too serious to be thus condoned. To admit them as a good defence would emasculate every criminal law in the land, and leave all public officers free to misinterpret statutes with impunity, and, no matter what the consequences, they could shield themselves from punishment. Mr. Johnson's pretended prototype, Jackson, did not so understand the law. When the Senate passed the resolution declaring his removal of his Secretary of the Treasury, Mr. Duane, a usurpation, Jackson regarded it as equivalent to impeachment. In his protest to the Senate he said:

That the resolution does not expressly allege that the assumption of power and authority which it condemns was intentional and corrupt, is no answer to the preceding view of its character and effect. The act thus condemned necessarily implies volition and design in the individual to whom it is imputed, and being unlawful in its character the legal conclusion is, that it was prompted by improper motives, and committed with an unlawful intent. The charge is not of a mistake in the exercise of supposed powers, but of the assumption of powers not conferred by the Constitution and laws, but in derogation of both, and nothing is suggested to excuse or palliate the turpitude of the act. In the absence of any such excuse or palliation there is room only for one inference, and that is, that the intent was unlawful and corrupt.

I cannot believe the respondent relies upon this plea of innocent intent as amounting even to a shadow of defence. He not only took the risk of construing the Constitution upon a question not settled by any judicial decision, but he did it in direct defiance of the solemn judgment of this Senate; and he to-day defies this judgment by denouncing the tenure act as unconstitutional. But the accused says even if the tenure act be held constitutional, still he is guiltless, because it does not apply to the case of Mr. Stanton; and this brings me to inquire—

Second. DOES THE TENURE ACT APPLY TO THE PRESENT SECRETARY OF WAR?

It is a new method of ascertaining the meaning of a law, plain upon its face, by resorting to legislative discussions, and giving in evidence opinions of persons affected by the law. As a matter of fact, it is well known the act was intended to prevent the very thing Mr. Johnson attempted in the matter of Mr. Stanton's removal, I think this manner of defence will not avail before this Senate. The law must govern in its natural and plain intendment, and will not be frittered away by extraneous interpretation. The President in his veto message admits substantially this construction.

The proviso does not change the general provisions of the act except by giving a more definite limit to the term of office, but the last paragraph of the act puts the whole question back into the hands of the Senate according to the general intention of the act, and provides that even the Secretaries are "subject to removal by and with the advice and consent of the Senate."

The act first provides that all persons holding civil offices at the date of its passage appointed by and with the advice and consent of the Senate shall only be removed in the same manner. This applies to the Secretary of War. The proviso merely gives a tenure running with the term of the President and one month

Digitized by Google

thereafter, subject to removal by the advice and consent of the Senate. The law clearly gives Mr. Stanton a right to the office from the 4th of March, 1865, till one month after the 4th of March, 1869, and he can only be disturbed in that tenure by the President by and with the advice and consent of the Senate.

Yet, although Mr. Stanton was appointed by Mr. Lincoln in his first term, when there was no tenure to the office fixed by law, and continued by Mr. Lincoln in his second term, it is argued that his term expired one month after the passage of the tenure-of-office act, March 2, 1867, for the reason that Mr. Lincoln's term expired at his death. This is false reasoning; the Constitution fixes the term of the President at four years, and by law the commencement of his term is the 4th of March. Will it be said that when Mr. Johnson is deposed by a verdict of the Senate that the officer who will succeed him, will serve for four years? Certainly not. Why? Because he will have no presidential term, and will be merely serving out a part of the unexpired term of Mr. Lincoln, and will go out of office 4th of March, 1869, at the time Mr. Lincoln would have retired by expiration of his term, had he lived.

I give section 10 of the act of March 1, 1792, which settles the question whether the term ceases with the death or resignation of the President, which so clearly decides the matter and settles it that no argument is necessary further on the subject:

SECTION 10. *And be it further enacted*, That whenever the offices of President or Vice President shall both become vacant, the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every State, and shall also cause the same to be published in at least one of the newspapers printed in each State, specifying that electors of the President of the United States shall be appointed or chosen in the several States within thirty-four days preceding the first Wednesday in December then next ensuing: *Provided*, There shall be the space of two months between the date of such notification and the said first Wednesday in December, but if there shall not be the space of two months between the date of such notification and the first Wednesday in December, and if the term for which the President and Vice-President last in office were elected shall not expire on the third day of March next ensuing, then the Secretary of State shall specify in the notification that the electors shall be appointed or chosen within thirty-four days preceding the first Wednesday in December in the year next ensuing, within which time the electors shall accordingly be appointed or chosen, and the electors shall meet and give their votes on the said first Wednesday in December, and the proceedings and duties of the said electors and others shall be pursuant to the directions prescribed in this act. * * * * * * *

This law settles certainly the question, if any doubt existed before, that the term does not expire on the death or resignation of the President, but continues as his term the four years.

But I will not argue this question at more length. If the judgment of men, deliberately expressed, can ever be relied upon, I think it safe to assume that this Senate will not reverse its judgment so recently expressed upon the constitutionality and meaning of the tenure act. The only question then which remains is simply this: Has the accused violated that act? No one knows better than this accused the history of, and the purpose to be secured by, that act. It was ably and exhaustively discussed on both sides, in all aspects. In the debates of Congress it was subsequently reviewed and closely analyzed in a veto message of the respondent. No portion of that act escaped his remark, and no practical application which has been made of it since did he fail to anticipate. He knew before he attempted its violation that more than three-fourths of the representatives of the people in Congress assembled had set their seal of disapprobation upon the reasons given in the veto message, and had enacted the law by more than the constitutional number of votes required. Nay, more; he was repeatedly warned, by investigations made looking towards just such a proceeding as is now being witnessed in this court, that the people had instructed their representatives to tolerate no violation of the laws constitutionally enacted. What then is the violation here charged upon this respondent, and what are the proofs to sustain it? Upon the 21st day of

February, 1868, the respondent sent the following official order to Edwin M. Stanton, Secretary of War:

EXECUTIVE MANSION, WASHINGTON, D. C.,
February 21, 1868.

SIR: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States, you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon the receipt of this communication.

You will transfer to Brevet Major General Lorenzo Thomas, Adjutant General of the army, who has this day been authorized and empowered to act as Secretary of War *ad interim*, all records, books, papers, and other property now in your custody and charge.

Respectfully yours,

ANDREW JOHNSON.

Hon. EDWIN M. STANTON, *Washington, D. C.*

Upon the same day he sent to Lorenzo Thomas, Adjutant General of the army, the following order:

EXECUTIVE MANSION, WASHINGTON, D. C.,
February 21, 1868.

SIR: Hon. Edwin M. Stanton having been this day removed from the office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War *ad interim*, and will immediately enter upon the discharge of the duties pertaintng to that office.

Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

Respectfully yours,

ANDREW JOHNSON.

Brevet Major General LORENZO THOMAS,
Adjutant General United States Army, Washington, D. C.

Every person holding any civil office, to which he has been appointed by and with the advice and consent of the Senate, * * * is and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified.

This plain and not to be misunderstood provision of the law is violated. The order for removal was made absolute and without condition. The President ignored all "advice and consent of the Senate," and planted himself upon his own opinion as to his inherent power to act outside of the law and in violation of it; and his answer so confesses. The proofs of his guilt are therefore placed beyond dispute. What, sirs, says the law with regard to the crime involved in such conduct? The sixth section of the same act declares that "every removal * * * made * * * contrary to the provisions of this act * * * is hereby declared to be a high misdemeanor."

Upon these facts, and in the face of this law, can there be a doubt that the charge is fully sustained? Need we pursue the question of intent, when by the terms of the law the mere act of removal, in violation of it, is declared a "high misdemeanor?" But, sirs, we do not shrink from an examination into the motives which actuated this accused. The history of his public acts since the passage of this law is crowded with evidences of his guilty intent. To-day, with the fear of that law before his eyes, he conforms strictly to its requirements; to-morrow he openly defies it and declares his purpose not to be governed by it; and, with the strangest inconsistency and indecision of character, he wavers between the plainest duty pointed out by law and the rashest contempt of all law. We have shown by the testimony that, under his instructions, the chiefs of the departments changed the forms of official bonds of commissions and letters of appointment to adapt them to the requirements of this law. We have seen that within five months after its passage, he suspended the Secretary of War and notified the several executive departments that he had done so under the provisions of this act. We have seen that hundreds of commissions, to fill various offices, were issued under his sign manual, distinctly

Digitized by Google

recognizing the provisions of this act. Yet, in defiance of the law and in disregard of his own repeated recognition of it, he asks this Senate to hold him guiltless. Do the annals of criminal trials anywhere present so monstrous an absurdity?

But the circumstances connected with this removal are themselves proof positive of a criminal purpose. Upon the twelfth of August, 1867, the President suspended the Secretary of War and appointed General Grant the *ad interim* Secretary. This suspension purported to be in conformity to the law, and was acquiesced in. Under the provisions of the second section of the "tenure act," this removal was reported to the Senate within twenty days after its next meeting. The reasons assigned by the President were duly considered by the Senate, and the following resolution communicated to the President as their decision:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
January 13, 1868.

Resolved, That, having considered the evidence and reasons given by the President in his report of the 12th of December, 1867, for the suspension from the office of Secretary of War of Edwin M. Stanton, the Senate do not concur in such suspension.
Attested:

The law says in such case, "but if the Senate shall refuse to concur in such suspension, such officer so suspended shall resume the functions of his office, and the powers of the person so performing its duties shall cease." The Secretary *ad interim* vacated the office accordingly, and the suspended Secretary resumed his duties. I will not stop now to speak of the unmanly and disgraceful attempt made by the President and his cabinet cabal to trick the General-in-chief into a violation of the law and to force upon Mr. Stanton the alternative of submitting to an indirect removal from office under cover of his suspension, or resorting to legal proceedings through the courts, which could not possibly have ended during the present administration. The history of all criminals illustrates a constant struggle between crime and cowardice—the desire to commit the crime and the fear of the consequences that may follow. The criminal intent to disregard the law was never more manifest in the mind of the accused than at this time; but his dread of punishment deterred him from the overt act. The answer of the respondent and the proofs spread upon the record show that from the 13th of January to the 21st of February he was scheming and devising means to thwart the vote of this Senate and to dispossess the Secretary of War in disregard of the law, and yet to evade, if possible, the punishment consequent upon its violation. The law told him if he should remove the Secretary he must do so "by and with the advice and consent of the Senate." He knew by the previous vote of that body that no such "advice and cosnent" would be given. He, therefore, not only admonished by the Senate but directed by the law, usurped a power nowhere given, and issued his mandate accordingly. With what effrontery then comes in the plea that his only motive was to innocently assert his prerogatives? Was the War Department to be made a mere plaything in the hands of the Executive? Was the machinery of that vast department to halt and its chief officer to subject himself to a trial for neglect of duty, while Mr. Johnson would amuse himself with preparing a case for the courts? Did he not know that the law enjoined duties upon the Secretary which he could not lay aside? Could he have for a moment supposed that that officer would tamely submit to an order for removal in which he had every reason to believe the Senate would not concur? No, sir; he comprehended fully the length and breadth of the offence he was then committing. He saw then, as plainly as he sees now, what would be the legal consequences of his act, and only hoped to shield himself behind that forbearance which he had mistaken for cowardice on the part of the representatives of the people.

But, Mr. President and Senators, this inquiry is relieved of all doubts; the

Digitized by Google

question is *res adjudicata*, and I have simply to read the decision rendered upon the same day this high-handed attempt at usurpation was made:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
February 21, 1868.

Whereas the Senate have received and considered the communication of the President stating that he had removed Edwin M. Stanton, Secretary of War, and had designated the Adjutant General of the army to act as Secretary of War *ad interim*: Therefore,

Resolved by the Senate of the United States, That, under the Constitution and laws of the United States, the President has no power to remove the Secretary of War and to designate any other officer to perform the duties of that office *ad interim*.

REMARKS UPON ARTICLE SECOND.

Let us pass to notice briefly article second. The respondent is here charged with violating the tenure-of-office act in the appointment of Lorenzo Thomas as Secretary of War on the 21st day of February, 1868, there being no vacancy in said office. The letter of appointment is as follows:

EXECUTIVE MANSION, WASHINGTON, D. C.,
February 21, 1868.

SIR: Hon. Edwin M. Stanton having been this day removed from the office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War *ad interim*, and will immediately enter upon the discharge of the duties pertaining to that office.

Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

Respectfully yours,

ANDREW JOHNSON.

Brevet Major General LORENZO THOMAS,
Adjutant General U. S. Army, Washington, D. C.

This appointment was made simultaneously with the removal of Mr. Stanton; it was made with the full knowledge that no vacancy existed, and that the Senate had so decided; it was made in defiance of all those repeated warnings to which I have alluded—that the Congress of the United States would regard the act as an open violation of law; it was made with every reasonable apprehension on his part that it would lead almost inevitably to his impeachment. Indeed, in this act, as well as others now laid to his charge, he seems not only to have defied, but to have courted impeachment.

The law told him here, as plainly as it told him in the matter of removal, that his act was denounced as a high misdemeanor in office. It told him more. It said to the person who would accept such appointment and attempt to discharge duties under it, would thereby himself commit a high misdemeanor in office. This respondent was therefore guilty of the double crime of himself violating the law and inducing others to join him in the criminal act. Section six of the tenure act says:

Every removal, appointment, or employment made, had, or received, contrary to the provisions of this act, and the making, signing, sealing, countersigning, or issuing of any commission or letter of authority for or in respect to any such appointment or employment, shall be deemed and are hereby declared to be high misdemeanors.

What defence is made for the palpable violation of the law now shown? The respondent goes back to the act of February 13, 1795, and rests his case upon that law, which provides as follows, (p. 415, 1 Statutes at Large:)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in case of vacancy in the office of Secretary of State, Secretary of the Treasury, or of the Secretary of the Department of War, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed or such vacancy be filled: *Provided*, That no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months.

Digitized by Google

But by the very terms of the act of 1795, this respondent can there find no defence; that law says, "*in case of vacancy in the office of Secretary of the Department of War*, whereby he cannot perform the duties of said office, it shall be lawful for the President to authorize any person to perform its duties." We see, then, *there must be a vacancy* in the office, or a disability on the part of the Secretary to act, before the President can make such an appointment. There was neither a vacancy nor a disability existing at the time Lorenzo Thomas was appointed. This respondent, then, has not only violated the tenure act, but he has violated the very law under which he claims immunity. Nothing can be plainer, and nothing exhibits more strongly the utter hollowness of his defence.

ARTICLE THIRD.

The next and third article charges the President with a violation of the Constitution of the United States in the appointment of Lorenzo Thomas as Secretary of War while the Senate was in session, no vacancy having occurred during the recess of the Senate, and no vacancy existing at the time. The facts alleged are not controverted; the question presented to the Senate under this article involves the proper construction of our fundamental law. I have previously addressed myself to the Senate upon this subject, and will not again enter upon it.

The line of inquiry is very simple. If this accused has violated a law constitutionally enacted, then has he violated the Constitution itself. He has sworn to support the Constitution, and by that oath he is enjoined to "take care that the laws are faithfully executed." He cannot support the Constitution and defy the laws enacted pursuant to it, any more than he can execute the laws faithfully and violate the Constitution. The duties are blended, and he cannot violate one without violating the other. If he be guilty under either the first or second article, he is guilty of the offence charged in the third.

ARTICLES FOURTH, FIFTH, SIXTH, AND SEVENTH.

The four succeeding charges allege conspiracy between the respondent and Lorenzo Thomas, and others unknown:

First. By force, intimidation and threats unlawfully to hinder Edwin M. Stanton, then Secretary of War, from holding said office, contrary to the provisions of an act to prevent and punish certain conspiracies, approved July 31, 1861.

Second. To prevent and hinder the execution of an act regulating the tenure of certain civil offices, passed March 2, 1867, by attempting unlawfully to prevent Edwin M. Stanton, then Secretary of War, from holding said office.

Third. By force to seize, take, and possess the property of the United States in the Department of War, then and there in the custody of Edwin M. Stanton, Secretary of the Department of War, contrary to an act to define and punish certain conspiracies, approved July 31, 1861.

Fourth. To seize, take, and possess the property of the United States in the Department of War, and in custody of said Stanton, with intent to disregard and violate an act regulating the tenure of certain civil offices, passed March 2, 1867.

That part of the conspiracy act which defines the offences here charged is as follows:

> That if two or more persons, within any State or Territory of the United States, shall conspire together * * * to oppose by force the authority of the government of the United States, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States against the will or contrary to the authority of the United States, or by force or intimidation or threat to prevent any person from accepting or holding any office, or trust, or place of confidence under the United States, each and every person so offending shall be guilty of a high crime.

The acts which he has himself admitted to have done, and those proved against him by the undisputed testimony of witnesses, bring his conduct within the letter

of the law. No other result could have followed his conduct—it tended *directly* to "hinder and delay the execution of" the tenure act. He had no other purpose than to "seize, take, and possess the property of the United States in the War Department," against the will and contrary to the authority of the United States, then in the lawful custody of the Secretary of War, and as placed there by the highest authority in the land. And it is equally evident that his design was to prevent Edwin M. Stanton from holding the office to which he had been legally appointed, and from which he had not been and could not be legally removed. We are not, then, to inquire at this time whether he is guilty of a high misdemeanor in doing these things, which have been made the *gravamen* of the first three articles; but we are to see whether he has unlawfully conspired, by force, or intimidation, or threat, to attempt the accomplishment of these objects.

What are the evidences of a conspiracy? It may be well first to inquire, what is a conspiracy? Under articles fourth and sixth we are confined in our definition to a conspiracy or agreement by force to do the things alleged. Under the fifth and seventh articles of impeachment the broader rule of the common law is applicable. Leaving the discussion of those articles for their proper place, let us inquire whether there is a conspiracy proved in violation of the act of 1861. To determine this, there must be grouped about the accused all the circumstances tending to explain his conduct.

From the very nature of the crime its perpetrators would carefully abstain from leaving any trace of their original purpose. We are, then, to scan the circumstances surrounding the transaction; we are to inquire into the character of the act to be performed, the means and the instrument employed, the declarations of the conspirators before and since, the mind and temper of the accused, as well as his co-conspirators, and everything that can throw light upon their motives and intentions. What are these circumstances, acts, and declarations?

Here we find the unmistakable declaration of one of the conspirators that he intended to use force; that should the doors of the department be barred against him he would break them down. When he made this declaration he had been once refused possession, and if any one thing appear more clearly than another in the testimony, it is that he fully anticipated a forcible contest in order to succeed. He was clothed with ample authority by the President to do this. It will not do to say that General Thomas's order was in the usual form, and therefore the President only expected of him the usual compliance with the order, for Thomas knew that not only in the opinion of his General-in-chief and the rightful Secretary of War, but in the solemnly declared judgment of Congress, that order was but blank paper; when, therefore, we find him declaring a purpose to resort to force, he only stated what was necessary to make the order of the slightest use. No one knew better than Thomas the consequences of even accepting such an order, and the mere agreement between the President and himself, the one to issue the order and the other to accept it and to enter upon its execution, both knowing it to be unlawful, is of itself enough to hold both responsible for the manner in which either attempted to execute it. But his conversation with Mr. Burleigh was not merely the idle talk of a garrulous old man, drawn out of him by an inquisitive interlocutor, for we find that on the same day, and previous to his conversation with Burleigh, he had a conversation with Samuel Wilkeson, in which, after some hesitation, he told that witness substantially the same thing, on two different occasions.

I quote briefly from his testimony, pp. 212, 213:

The WITNESS. I asked him to tell me what had occurred that morning between him and the Secretary of War in his endeavor to take possession of the War Department. He hesitated to do so till I told him that the town was filled with rumors of the change that had been made, of the removal of Mr. Stanton and the appointment of himself. He then said that since the affair had become public he felt relieved to speak to me with freedom about it. He drew from his pocket a copy, or rather the original, of the order of the President of the

United States, directing him to take possession of the War Department immediately. He told me that he had taken as a witness of his action General Williams, and had gone up into the War Department and had shown to Edwin M. Stanton the order of the President, and had demanded, by virtue of that order, the possession of the War Department and its books and papers. He told me that Edwin M. Stanton, after reading the order, had asked him if he would allow to him sufficient time for him to gather together his books, papers, and other personal property and take them away with him; that he told him that he would allow to him all necessary time to do so, and had then withdrawn from Mr. Stanton's room. He further told me, that day being Friday, that the next day would be what he called a *dies non*, being the holiday of the anniversary of Washington's birthday, when he had directed that the War Department should be closed; that the day thereafter would be Sunday, and that on Monday morning he should demand possession of the War Department and of its property, and if that demand was refused or resisted he should apply to the General-in-chief of the army for a force sufficient to enable him to take possession of the War Department; and he added that he did not see how the General of the army could refuse to obey his demand for that force. He then added that under the order that the President had given to him he had no election to pursue any other course than the one that he indicated; that he was a subordinate officer directed by an order from a superior officer, and that he must pursue that course.

Here we find, not only the purpose to use force distinctly declared, but that, under the "order the President had given him, he had no election to pursue any other course." I ask, how he could have spoken truthfully and have made any other declaration, when it is patent that no other course could have been successful? It does not seem to me that this view of the case could be made to appear more clear by illustration; and yet let me put a parallel case.

Suppose Andrew Johnson had determined to possess himself of the Capitol with a view of ousting Congress, and had directed the Speaker of the House of Representatives and the President of the Senate to turn over all the records, and had directed Thomas to take immediate possession. Such an order would be no less unlawful, in one view of the tenure act, than the one he gave. Could anybody doubt that such an order would mean revolution, and that a clash of arms must follow if it were executed; and, if such thing followed, that Mr. Johnson would be directly chargeable with the consequences? Would not *force* appear all over the order, though the word were not written? If the officer charged with executing such order declared, after receiving it, that he intended to use force, would any sane man set up that the President must not be held accountable for the declarations of such officer, when they were declarations showing the only means of accomplishing the object? Let me ask wherein this hypothetical case is not covered by that at bar? Mr. Stanton was intrenched behind the law as securely as is Congress; he had frequently declared that he would not yield except to superior force. I say, then, that when the President ordered Thomas to take immediate possession of the War Department, he gave him a *carte blanche* to do whatever he thought necessary to accomplish his purpose, and Thomas only echoed his co-conspirator when he talked with Burleigh and Wilkeson. But General Thomas not only communicated his purpose to Burleigh, but he afterwards told this witness why he had not executed his plan. Witness says (page 210) that he (Thomas) told him that the only thing that prevented his taking possession of the War Department on the morning he had invited Burleigh to be present, was because of his arrest by the United States marshal at an unusually early hour. At this point, before noticing the attempt of Thomas to seize the War Department on the morning of the 22d of February, I desire to call attention to a fact in evidence showing a perfect concurrence of mind between the President and his co-conspirator, Thomas. On the morning of the 22d the President's private secretary addressed a note, by direction of the President, to General Emory, in command of the military forces of the department. General Emory responded in person, and met the President about the same hour that Thomas entered the War Department. That interview is made the subject-matter of a separate article, and I will not give it at length in this place. But I urge that no man can read General Emory's narrative of what then

Digitized by Google

transpired in the light of the circumstances surrounding this case, and not feel himself driven to the conclusion that the President meant to use the military force of this department through that officer to carry out his unlawful design; and nothing but the indirect rebuke administered by General Emory, and his avowed purpose made to the President to obey no orders except they should come through the General-in-chief, as by law provided, deterred the accused from then and there directing him to marshal his forces, if necessary, for the expulsion of Mr. Stanton.

While this remarkable scene was transpiring in the Executive Mansion, another not less remarkable was being enacted by the tool of the President at the War Department. There were many witnesses present, most of whom have testified. As they concur substantially in their testimony, I will give that of but one of them, Hon. Thomas W. Ferry. (See page 225.)

In the presence of Secretary Stanton, Judge Kelley, Moorhead, Dodge, Van Wyck, Van Horn, Delano, and Freeman Clarke, at twenty-five minutes past twelve m., General Thomas, Adjutant General, came into this Secretary of War office, saying, "Good morning," the Secretary replying, "Good morning, sir." Thomas looked around and said, "I do not wish to disturb these gentlemen, and will wait." Stanton said, "Nothing private here; what do you want, sir?"

Thomas demanded of Secretary Stanton the surrender of the Secretary of War office. Stanton denied it to him, and ordered him back to his own office as Adjutant General. Thomas refused to go. "I claim the office of Secretary of War, and demand it by order of the President."

STANTON. "I deny your authority to act, and order you back to your own office."

THOMAS. "I will stand here. I want no unpleasantness in the presence of these gentlemen."

STANTON. "You can stand there if you please, but you cannot act as Secretary of War. I am Secretary of War. I order you out of this office and to your own."

THOMAS. "I refuse to go, and will stand here."

STANTON. "How are you to get possession; do you mean to use force?"

THOMAS. "I do not care to use force, but my mind is made up as to what I shall do. want no unpleasantness, though. I shall stay here and act as Secretary of War."

STANTON. "You shall not, and I order you, as your superior, back to your own office."

THOMAS. "I will not obey you, but will stand here and remain here."

STANTON. "You can stand there, as you please. I order you out of this office to your own. I am Secretary of War, and your superior."

Thomas then went into opposite room across hall (General Schriver's) and commenced ordering General Schriver and General E. D. Townsend. Stanton entered, followed by Moorhead and Ferry, and ordered those generals not to obey or pay attention to General Thomas's orders; that he denied his assumed authority as Secretary of War *ad interim*, and forbade their obedience of his directions. "I am Secretary of War, and I now order you, General Thomas, out of this office to your own quarters."

THOMAS. "I will not go. I shall discharge the functions of Secretary of War."

STANTON. "You will not."

THOMAS. "I shall require the mails of the War Department to be delivered to me, and shall transact the business of the office."

STANTON. "You shall not have them, and I order you to your own office."

Gentlemen of the Senate, was this the method of executing an ordinary command of an officer delivered to him for an ordinary purpose? Did Thomas assume this belligerent attitude and enter upon this despicable business in such violent manner without having been instructed to do so, if necessary, by the man whose orders he was executing? Is it not probable that at the very moment he was bullying the Secretary of War, and ordering General Schriver and General Townsend to recognize him as the rightful secretary, he was expecting the force necessary to maintain his authority from General Emory, who, he thought, was receiving instructions from the President to that effect? Sirs, this coincidence and concurrence of action between the President and Thomas on that morning is susceptible of no reasonable solution, other than that they meditated the use of force, and were availing themselves of every possible means to obtain it.

Now, sirs, I do not desire to pursue this inquiry further. If there was a conspiracy between these parties to take possession of the War Department by force, as I think has been fully shown by the evidence at this trial, then that

conspiracy must be held to extend necessarily to the charges laid in the fourth and sixth articles, and they need not be separately discussed.

I will now briefly notice the charge laid in articles fifth and seventh. The President is here charged with conspiring with Lorenzo Thomas and others unknown to seize, take, and possess the property of the United States in the Department of War, and to hinder and prevent Edwin M. Stanton, the Secretary of said department, from holding his said office; this in violation of the civil tenure act. In these charges there is no allegation of force being meditated, as was necessary in alleging the violation of the conspiracy act. The offence charged, then, consists simply in an agreement to do an unlawful act in an unlawful manner. It does not matter what means were contemplated, nor what used. It is enough to know that the act and the manner of its accomplishment were unlawful.

The evidence already adduced, and the laws cited, show that at the time that the accused attempted Mr. Stanton's removal he was lawfully in possession of his office. The evidence and the laws noticed also show that the accused had exhausted every legal means to remove Mr. Stanton. I say, then, that Mr. Johnson could take no step beyond these, which would not in itself be an unlawful act. There was no way to remove Mr. Stanton against his will, and without the advice and consent of the Senate, except by resort to unlawful means. If he is proved to have attempted this by concert or agreement with one or more, he is guilty of a conspiracy so to do. There is, sirs, an unwarrantable attempt to throw around this charge of conspiracy a meaning which it has not in law, to clothe this offence with something abhorrent to public sentiment; and we are told that persons may be jointly engaged in the most heinous crimes, and yet we must be cautious before convicting them of a conspiracy. This is an appeal to popular prejudice; and is nowhere to be derived from the books or decisions upon criminal law. The accused could not himself carry out his unlawful purpose; he was forced to select an accomplice. He made that selection, the agreement was entered into, the requisite order issued, the two minds met, and one of the parties entered upon the design to be accomplished, and that design being an unlawful one, the conspiracy was complete. The tenure of office act, in its fifth and sixth sections, denounces as a high misdemeanor the very acts which are proved to have been committed by the President. Were it not for the rule of law which protects him while in his high office from a criminal prosecution before a jury of his countrymen, he could upon his own answer be convicted and sentenced to imprisonment. And so, also, could Lorenzo Thomas. How then can he escape conviction before this court which can properly try him, simply because he has united with one or more persons to commit the offence? All the evidence which has been presented under the fourth and sixth articles applies with greater weight to the fifth and seventh. And should it be found not to establish that he conspired by *force* to remove Mr. Stanton, it by no means follows that he did not conspire at all. It would seem to me a work of supererogation to add to the grouping of guilty circumstances already given to intensify the proofs of complicity.

The accused has admitted in his answer that on and before August 5, 1867, "he became satisfied that he could not *allow* the said Stanton to continue to hold the office of Secretary of the War Department;" * * "that he did necessarily consider and *determine* that the said Stanton ought no longer to hold the said office;" * * "and to give effect to such his decision and *determination*, he did address the said Stanton a note, &c., following:

"SIR: Public considerations of a high character constrain me to say that your resignation as Secretary of War will be accepted."

To which Mr. Stanton on the same day said: "In reply I have the honor to say, that public considerations of a high character, which alone have induced me

Digitized by Google

to continue at the head of this department, constrain me not to resign the office of Secretary of War before the next meeting of Congress."

Here was the first step pursuant to the plan to dispossess Mr. Stanton peaceably if he could, forcibly if he must. Here he was plainly told that only by resort to the latter means would the Secretary yield. The answer tells us he was forced to consider what "acts could be done to cause the said Stanton to *surrender* the said office." Surrenders, Mr. President, do not often precede force. They usually follow not only its exhibition but its application.

The tenure act pointed out but one way, and Mr. Stanton having declined to resign, that law pointed out the only peaceable way.

He next, on the 12th of August, seven days after Mr. Stanton refused to resign, appointed General Grant *ad interim*, and suspended Mr. Stanton; but this was but of temporary duration, for the Senate refused to concur, and Mr. Stanton resumed his functions of office.

Here ended all legal means; here ended all peaceable means; this exhausted every resort except to force, and this he prepared himself to use. He says the next step, although a violation of the law, was taken to raise a question for the courts. This will not do. He had been told in plainest terms by Mr. Stanton that he would not resign; he had been told by that officer that he yielded to superior force in the matter of his suspension, and he knew that the Senate had practically instructed Mr. Stanton that no attempt at removal by unlawful means would be sustained by them. We have Mr. Johnson, then, brought to an alternative which had but one solution in his mind, and that he had already determined upon, viz: to remove Mr. Stanton at all hazards.

To raise a question for the courts forsooth! He could not do this, and he well knew it, except by committing a trespass upon the bailiwick of Mr. Stanton, by law assigned him, and when within his office by forcibly ejecting him therefrom. If, sirs, his design was not to go this far, still if it included a purpose to establish a second Secretary of War in that building, and require the subordinates to obey the orders of the pretended Secretary, this was force in the meaning of the act. We are bound to infer that when Mr. Johnson sat out to accomplish an object which he had every reason to believe would be successful only upon the application of force, he meditated that force; and whether he subsequently went to that extreme does not matter; the offence is complete without it. But what did he do? Having failed to secure the General-in-chief as a tool, he selected an officer of the army, who was nominally Adjutant General, but whom neither Mr. Lincoln while he was President, nor Mr. Stanton, would trust in charge of the Adjutant General's department. The respondent peremptorily ordered the General-in-chief to reinstate this man, knowing that he could not show a greater contempt for Mr. Stanton's authority than to thrust upon that department an officer whom Mr. Stanton himself had suspended from his duties. He had still another motive; the office of the Adjutant General was in the same building with that of the Secretary of War, and the ulterior purpose to possess himself of the entire building was thus to be more readily accomplished. On the 21st of February General Thomas was directed to take immediate possession of the War Department. He went accordingly, and demanded the office. It is in evidence that on that same day the Senate, upon information furnished them by the Secretary of War, passed a resolution declaring the attempted removal of Mr. Stanton a violation of the Constitution and the laws, and that resolution upon the same day was placed in the hands of the accused and his co-conspirator Thomas. Not only this: they both knew that the House of Representatives had, in view of this removal, entered seriously upon the consideration of this respondent's impeachment. With these proceedings well understood, with the consequences certain to await the accused and his co-conspirators, the order to Thomas is not countermanded, nor are his

Digitized by Google

instructions changed, but the plan originally entered upon is attempted to be carried out without the slightest deviation, as we learn from Thomas's testimony, and with the plan fresh in his mind as laid before him by the accused, Thomas, on that same night stated to Mr. Burleigh, what he was going to do. Let me give a portion of Burleigh's testimony, pp. 201–2.

A. On the evening of the 21st of February last, I learned that General Thomas had been appointed Secretary of War *ad interim*, I think while at the Metropolitan Hotel. I invited Mr. Leonard Smith, of Leavenworth, Kansas, to go with me up to his house and see him. We took a carriage and went up. I found the general there getting ready to go out with his daughters to spend the evening at some place of amusement. I told him I would not detain him if he was going out; but he insisted on my sitting down, and I sat down for a few moments. I told him that I had learned he had been appointed Secretary of War. He said he had; that he had been appointed that day, I think; that after receiving his appointment from the President he went to the War Office to show his authority or his appointment to Secretary Stanton, and also his order to take possession of the office: that the Secretary remarked to him that he supposed he would give him time to remove his personal effects or his private papers, something to that effect; and his reply was "Certainly." He said that in a short time the Secretary asked him if he would give him a copy of his order, and he replied "Certainly," and gave it to him. He said that it was no more than right to give him time to take out his personal effects. I asked him when he was going to assume the duties of the office. He remarked that he should take possession the next morning at 10 o'clock, which would be the 22d; and I think in that connection he stated that he had issued some order in regard to the observance of the day; but of that I am not quite sure. I remarked to him that I should be up at that end of the avenue the next day, and he asked me to come in and see him. I asked him where I would find him, and he said in the Secretary's room, up stairs. I told him I would be there. Said he, "Be there punctual at 10 o'clock." Said I, "You are going to take possession to-morrow?" "Yes." Said I, "Suppose Stanton objects to it—resists?" "Well," said he, "I expect to meet force by force," or "use force."

Mr. CONKLING. Repeat that.

The WITNESS. I asked him what he would do if Stanton objected or resisted? He said he would use force or resort to force. Said I, "Suppose he bars the doors?" His reply was, "I will break them down" I think that was about all the conversation that we had there at that time in that connection.

I have not noticed the sending for General Wallace, the officer second in command of this military department, after the President had failed in his attempted seduction of General Emory. I have not noticed the frequent declarations of the co-conspirator Thomas, showing that, up to the time this trial was entered upon, he had not desisted from his purpose to possess himself of the War Department; that he is, in violation of any other theory than that he is, and has been since his appointment, in perfect accord and agreement with the President, received into cabinet councils and official communication with the President as Secretary of War; that he has certified papers, one of which is in evidence, as Secretary of War; and in them at least, if not practically, is to-day by recognition and order of the President a *de facto* Secretary of War.

But, sirs, casting aside all evidence introduced by the prosecution, and looking at the charge of conspiracy in light of the testimony which the answer furnishes, there is left us but one of two conclusions: either that this accused and General Thomas are fully sustained by the law in what they did and attempted to do, or they are both guilty, and the one now on trial must be convicted.

I will not here stop to notice the charges laid in article eighth. The offence does not materially differ from that laid in the second and third articles.

ARTICLE NINTH.

We are brought, then, to notice article ninth, which charges that the accused instructed General Emory that the act of Congress approved March 2, 1867, was unconstitutional and in contravention of commission of the said Emory, with intent to induce him, in his official capacity as commander of the military forces of this department, to violate the provisions of that act, and with the further intent thereby to enable the accused to prevent the execution of the tenure act, and also prevent Edwin M. Stanton, the Secretary of War, from discharging the

duties of his office by virtue thereof. It would be difficult to read General Emory's testimony under this charge, if it stood unconnected with any other evidence, and not conclude that he was sent for by the President with a view to counsel a violation of this law.

This testimony is brief, and I crave the indulgence of the court to read it as given upon the record. General Emory was summoned by the President's private secretary. The note sent him and his testimony I will now read.

General Emory's testimony, pages 227, 228, and 229:

"EXECUTIVE MANSION, WASHINGTON, D. C.,
"*February* 22, 1868.

"GENERAL: The President directs me to say that he will be pleased to have you call on him as early as practicable.

"Very respectfully and truly, yours,

"WILLIAM G. MOORE,
"*United States Army.*"

Q. How early did you call?—A. I called immediately.

Q. How early in the day?—A. I think it was about mid-day,

Q. Whom did you find with the President, if anybody?—A. I found the President alone when I first went in.

Q. Will you have the kindness to state as nearly as you can what took place there?—A. I will try and state the substance of it, but the words I cannot undertake to state exactly. The President aske me if I recollected a conversation he had had with me when I first took command of the department. I told him that I recollected the fact of the conversation distinctly. He then asked me what changes had been made. I told him no material changes; but such as had been made I could state at once. I went on to state that in the fall six companies of the twenty-ninth infantry had been brought to this city to winter; but, as an offset to that, four companies of the twelfth infantry had been detached to South Carolina, on the request of the commander of that district; that two companies of artillery, that had been detached by my predecessor, one of them for the purpose of aiding in putting down the Fenian difficulties, had been returned to the command; that, although the number of companies had been increased, the numerical strength of the command was very much the same, growing out of an order reducing the artillery and infantry companies from the maximum of the war establishment to the minimum of the peace establishment. The President said, "I do not refer to those changes." I replied that if he would state what changes he referred to, or who made the report of the changes, perhaps I could be more explicit. He said, "I refer to recent changes, within a day or two," or something to that effect. I told him I thought I could assure him that no changes had been made; that, under a recent order issued for the government of the armies of the United States, founded upon a law of Congress, all orders had to be transmitted through General Grant to the army, and, in like manner, all orders coming from General Grant to any of his subordinate officers must necessarily come, if in my department, through me; that if, by chance, an order had been given to any junior officer of mine, it was his duty at once to report the fact. The President asked me, "What order do you refer to?" I replied, "To Order No. 17 of the series of 1867." He said, "I would like to see the order," and a messenger was despatched for it. At this time a gentleman came in who I supposed had business in no way connected with the business that I had in hand, and I withdrew to the further end of the room, and while there the messenger came with the book of orders, and handed it to me. As soon as the gentleman had withdrawn I returned to the President, with the book in my hand, and said I would take it as a favor if he would permit me to call his attention to that order; that it had been passed in an appropriation bill, and I thought it not unlikely had escaped his attention. He took the order and read it, and observed, "This is not in conformity to the Constitution of the United States, that makes me Commander-in-chief, or with the terms of your commission."

Mr. HOWARD. Repeat his language, if you please.

The WITNESS. I cannot repeat it any nearer than I am now doing.

Mr. CONKLING. Repeat your last answer louder, so that we may hear.

Mr. JOHNSON. What he said.

The WITNESS. What who said, the President or me?

Mr. HOWARD. The President.

The WITNESS. He said, "This is not in conformity with the Constitution of the United States, which makes me Commander-in-chief, or with the terms of your commission." I replied, "That is the order which you have approved and issued to the army for our government," or something to that effect. I cannot recollect the exact words, nor do I intend to quote the exact words, of the President. He said, "Am I to understand that the President of the United States cannot give an order except through the General of the army," or "General Grant?" I said, in reply, that that was my impression; that that was the opinion that

the army entertained, and I thought upon that subject they were a unit. I also said, "I think it is fair, Mr. President, to say to you that when this order came out there was considerable discussion on the subject as to what were the obligations of an officer under that order, and some eminent lawyers were consulted—I myself consulted one—and the opinion was given to me decidedly and unequivocally that we were bound by the order, constitutional or not constitutional." The President observed that the object of the law was evident.

Mr. Manager BUTLER. Before you pass from that, did you state to him who the lawyers were that had been consulted?—A. Yes.

Q. What did you state on that subject?—A. Perhaps, in reference to that, a part of my statement was not altogether correct. In regard to myself, I consulted Mr. Robert J. Walker.

Q. State what you said to him, whether correct or otherwise?—A. I will state it. I stated that I had consulted Mr. Robert J. Walker, in reply to his question as to whom it was I had consulted; and I understand other officers had consulted Mr. Reverdy Johnson.

Q. Did you say to him what opinion had been reported from those consultations?—A. I stated before that the lawyer that I had consulted stated to me that we were bound by it undoubtedly; and I understood from some officers, who I supposed had consulted Mr. Johnson, that he was of the same opinion.

Q. What did the President reply to that?—A. The President said, "The object of the law is evident." There the conversation ended by my thanking him for the courtesy with which he had allowed me to express my own opinion.

Q. Did you then withdraw?—A. I then withdrew.

I have said that this testimony, standing alone, bears upon its face proof of guilt, but we are not permitted to view it from so narrow a standpoint. It is illumined from many sources, and is given a significance not be misunderstood. There is scarcely a scene or act connected with this remarkable drama of Executive usurpation which does not explain this attempt to alienate a gallant officer from his General-in-chief, and stamp it as scarcely less infamous than the attempt previously made to alienate the General-in-chief from the whole loyal people of the land.

Sirs, there is not in this the naked procuration to violate law but a treasonable attempt to poison the mind of a high army officer to sow dissension, insubordination, and treachery in the army. This too, sirs, from the commander-in-chief. Such conduct in an officer or soldier is, by the articles of war, punishable with death. Scores of soldiers have paid this penalty for mutinous conduct not half so aggravating. The moral sense not only of the army but of the country must be shocked at such an exhibition from a chief magistrate; and, sirs, I will be pardoned for saying that General Emory never did a more heroic act than when he spurned the treacherous offer of high command which he knew would await him should he lend himself to the conspiracy already hatched by the President.

Now, sirs, how is this extraordinary interview explained by the accused? He says in his answer that his purpose was to ascertain what changes had been made in the military affairs of this department. That may have been one of his motives, but is it to be believed for a moment that this was all? To do this we must shut our eyes to all the cumulative evidence in this case. No one was threatening to use force against Mr. Johnson. There was no effort being made to oust him from office by force. He had nothing to apprehend from the military forces of this department. There was no unusual excitement anywhere in the country that made it necessary for him to marshal these forces. The only thing, sirs, which he had any reason to apprehend might happen, was, that in the event he persisted in his design to execute his order to remove the Secretary of War, this military force might not be found subservient to his wishes. And here we have a key which unlocks his treasonable designs. Here we have his motive made plain as the sunlight. He could not, by open confession, disclose more certainly what was intended by him when he summoned General Emory to his presence. It was not a proper question to ask that officer, when upon the witness stand, what he understood the President to mean by that cabalistic manner with which he introduced the subject of recent changes in the military forces made within a day or two. That is a question for you, senators, to answer. General Emory could have answered it but one way. But let us see whether the turn which the conversation took does not of itself show the lead-

ing motive which the President had in mind. General Emory had responded fully as to the question put him; and assured the President that there had been no recent changes, and could be none (under the law and orders) without General Emory's first knowing it. There the conversation ought to have ended if the President's answer is held to disclose the whole truth. General Emory read to him the law by which he was guided, and the President himself took it and read it, and immediately observed:

This is not in conformity with the Constitution of the United States, which makes me Commander-in-chief, or with the terms of your commission.

General Emory replied, speaking of the order which promulgated that law:

That is the order which you have approved and issued to the army for our government.

The Commander-in-chief being thus baffled by his subordinate, made this reply:

Am I to understand that the President of the United States cannot give an order except through the General of the army, or General Grant?

This last answer is a complete portraiture of the President's motives, and his disappointment in not finding in Emory a willing tool through whom he might prosecute his designs. To put this in other phrase it would read:

Then, General Emory, I am to understand you will not obey my orders unless I communicate them through General Grant?

General Emory felt himself called upon to say that with regard to this law the army were a unit. Of its meaning the President could have had no doubt, for after listening to General Emory a moment longer, he remarked, with apparent disappointment at the result of the interview, "the object of the law is evident," and they then separated.

When we remember that this is but one of the links in the chain being forged by the accused with which to manacle the Secretary of War and bind a great department of the government to the Juggernaut used by him to crush all opposition to executive will, the offence appears in hideous distinctness. That it was such a link to be thus used, I am forced to believe, and I leave it to await the judgment of this high court.

I am disinclined, after this protracted discussion, to dwell at any length upon the tenth and eleventh articles; and yet I beg not to be understood as derogating from their importance or their gravity. The accused is here charged not only with improprieties and indecencies of speech; he is not only called to answer intemperate, disgraceful, incendiary, and riotous language; but he is charged with following up the purposes avowed in these speeches by overt acts looking directly to the obstruction of the laws, which he had sworn to take care should be faithfully executed. If the conduct of this accused, in his official capacity, in word, act, and deed, has not shown conclusively his guilt under both of these articles, then there could be no proof adduced, however strong, that would be sufficient.

The proof does show his unlawful attempt to obstruct the laws as therein charged. I will not again do more than to ask your examination of the facts proved and found in the recorded testimony, which shows how eagerly he entered upon the dangerous business of obstructing and defying the laws of the country. As to his speeches, upon which the tenth article is based, look at them, read them; there they stand in history as a monument of his everlasting disgrace. The great labor of explaining and justifying such speeches and conduct is certainly in able hands. It is defended and justified as one of the great privileges of the President of the United States to be guilty of such indecency, impropriety, vulgarity, profanity, and impiety of speech as to offend the moral sense of the whole people. It is for them to show how far the liberty of indecent speech in a high official may be indulged before it reaches that unwarrantable license where the only power that can *will* step in and correct the wrong. The

Digitized by Google

idea that a President may so demean himself by indecent speech as to make him a scoff and byword, and place himself so low in the moral scale that none "would stoop to touch his loftiest thought," and yet not be guilty of such misdemeanors as would call for the very action we have taken, is beyond my ken.

"O Judgment thou art fled to brutish beasts,
And men have lost their reason."

The defence have not, by their evidence, contradicted what we have proven, but have only strengthened our case. There has been no proof adduced on the part of the defendant that either will justify or excuse his unlawful acts. The evidence of General Sherman, and all others put on the stand by the defence, only make his guilt the more manifest. The attempt by documentary evidence to prove the practice of the government to justify his act proves that the practice has been to obey the law and not violate it, as all appointments and removals proved have been made under some existing law, either the laws of 1789, 1795, 1820, 1856, or some authority in law upon which the act was based. But suppose every other administration had violated the law; would that justify the violation of a positive enactment making its violation a crime or misdemeanor? Certainly not. If so, a murderer might justify his murder on the grounds that murders were common in the country from the commencement of the government to the present time. Even the advice of his Cabinet cannot excuse him. By advising a crime they cannot shield their chief, but may be impeachable themselves for advising a disobedience of law. But it is all of record, and I will not pursue it further. We have laid bare his offences. In all that has been proven, or aught of his conduct since President, which is a matter of history, there is not to be found a good motive for his conduct. He is found without any of the elements necessary to fit him for any official position.

Goodness, clemency, and a proper liberality should be among the virtues that adorn a Chief Magistrate. With the aid of these, he should be able to greatly assist in the amelioration of the condition of the whole people. The chief end of all his actions should be to promote peace, safety, prosperity, and happiness to the nation.

This was the idea of the heathen philosophers; they defined a good prince as "one who endeavors to render his subjects happy;" "and a tyrant," on the contrary, "one who only aims at his own private advantage."

An example of the first we had in the lamented Lincoln, and of the latter in Mr. Johnson.

Mr. Lincoln was endowed with one of the most genial souls that heaven ever gave to man, and an intellect of most wonderful power. His apprehension was quick, his judgment sound, his conclusions correct. His mind was sufficiently capacious to comprehend all the vast range of thought to which occasion gave scope. He met the critical hour of duty to his country like a statesman and a man. He sustained loyalty, and gave all his strength in crushing treason. Instead of denouncing your Congress, he consulted and advised with them for the good of the country. Instead of vetoing every law, he aided and assisted in giving them force. Instead of openly violating the plain provisions of your enactments, he executed them faithfully, as was his duty.

How a government is to be administered while peace is smiling, is one thing, and how it is to be administered amidst the horrors of war, is quite another thing. Mr. Lincoln had wants hourly multiplying upon his hands that before or since were unheard of. The difficulties with which the war on our hands was complicated were almost interminable; but with each new-found difficulty he found *new strength*, *hope*, and *energy*, until all obstacles were overcome and the war ended. But at the very dawn of the nation's new birth, resting from his labors and contemplating that peace that was then breaking through the dark, angry clouds of war, he fell by the hands of an assassin.

Yes, his sun has set forever. Loyalty's gentle voice can no longer wake

Digitized by Google

thrills of joy along the tuneless chords of his mouldering heart. Yet the patriots and lovers of liberty, who still linger on the shore of time, rise and bless his memory; and millions yet unborn will in after times rise up to deplore his fate, and cherish, as a household word, his deathless name.

Mr. President and Senators, what patriots that linger behind will rise up and bless the memory of Andrew Johnson? Who will in after times rise up to deplore the fate that now surely awaits him? Who will cherish as a household word his dishonored name? None, none, Mr. President; no, not one! No, sir; the virtues that should adorn a Chief Magistrate fled on the induction of this criminal into that high office. In sadness and sorrow did the people witness this man succeed to the executive chair—not by their spontaneous voice, not by their free accord, but by the ministration of the murderer's missive. They witnessed him, who had acquired power by such a sorrowful and inauspicious chance, bending blindly to the behests of those whose adherents, if not they themselves, had lately been in rebellious arms against that Constitution which he had sworn to protect and maintain. They saw him, flushed with arrogance and pride, despise the warnings of the people, and deride the mandates of their legislators. When an act of the legislative department of the government would not inure to his advantage politically, they saw him openly violate and trample it under foot. When loyalty was supported and peace attempted to be perpetuated, they saw him disregard their will and throw all manner of obstructions in the way.

When the officers of the government would not bend the knee and cry "great and good prince," they saw him attempt to hurl them from his courts. When the commander of the army would not do his bidding, they have seen him conspire to destroy his good name and fame before the country. When the country was at ease, they have seen him give it grief and pain. When at peace and rest, they have seen his attempt to give it revolution and blood.

They saw him with a ruthless and heavy hand attempt to seize the nation's purse and the nation's sword, and thus by clutching in his longing grasp all the attributes of power, place himself in a condition where he might with safety announce his views and enforce his designs.

They felt the weight of his great office fall like an enshrouding pall over a suffering people. They marked with alarm and consternation his rapid strides to that point where his sway would have been autocratic and his reign irresistible. It was not alone by force that this was to be accomplished. By appeals which were designing, and all the more dangerous because of apparent candor, he drew to him the careless and unsuspecting. By pledges, all the more reprehensible because of plighted honor, he soothed the suspicions of the cautious and the wise. By profuse disposition of rewards in his hands, he gained the mercenary and attracted the unscrupulous; and where the pliant arts of flattery and persuasion failed to accomplish his intended views, by the stern show of his power and authority, he awed the timid and overbore the weak.

These, sirs, we have manifested, if by our proof we have made aught manifest. And to all this what does he reply? That, though his acts were bad, his motives were good; that, though his course was unlawful, his heart was well-meaning; that he trampled on the law, in order that he might uphold the law; that he disregarded his oath, the better to enable him to keep it. When we ask him why he set aside the law of the land, he replies that it was because it was opposed to the Constitution of the land; and when we again inquire as to the Constitution of the land, we are assured that it is his prerogative to construe it even in violation of the laws of the land. Have I stated this beyond the line of his defence? Have I wronged him by one unjust description of his conduct or his claim? If not, shall this state of things longer exist? Shall we snap the chains that bind us, or continue in them longer? Shall we vindicate the law, or crouch at the usurper's frown? Shall we vindicate to-day the principle

that underlies the very foundation of this government, or allow the laws to be trampled under foot at the will of every tyrant?

It is a fundamental principle of this government that there shall be a known rule and law by which not only the conduct of the citizen, but all officers, including the Chief Magistrate of the nation, shall be regulated and governed. This is a government of laws and not of men. It is this principle which distinguishes this republican form of government of ours from the monarchies of the Old World.

I repeat, sirs, this is a government of laws and not of men. Never, before, I believe, was it known in this enlightened country that the executive head of the nation had the arrogance to take upon himself not only the executive but the judicial functions of the government. No, sir; under the smiles of that merciful Providence who had watched over and guided the destinies of the people, we have hitherto been exempt, and I trust in God shall hereafter continue to be, from the affliction of that most direful scourge, a Chief Executive with full discretionary powers to execute a law or declare it unconstitutional at will. It is not that which pleaseth nor that which is most consonant with the humor and inclination of the President, but the law, which should be the rule of his conduct. I trust, sirs, that the time will never again come in the history of this nation when, by elevation to the Presidency, any one will become so infatuated as to imagine himself independent of that rule, or to set up his own private judgment or opinions as the only standard by which he will be guided or governed. Then, sirs, whether we shall in the future witness this attempt in other executives depends upon your decision upon the issues in this case involved. Being the grand tribunal from which there can be no appeal, you should properly reflect the law and the testimony. The pure stream of public justice should flow gently along, undisturbed by any false pretence on the part of the defendant, or false sympathy upon your part. The President should not be permitted to play the necromancer with this Senate as he did with the country through the law department of the executive branch of the government, whereby he raised a tempest that he himself could not control. Well might he have exclaimed—

"I am the rider of the wind,
The stirrer of the storm;
The hurricane I left behind
Is yet with lightning warm."

But, thanks to the wisdom of our far-seeing patriot sires, you, senators, are by our Constitution made the great power that shall calm the tempest and so direct the lightning that its strokes shall be warded off from the people and fall only upon the head of their oppressor.

Yes, senators, we fervently hope and confidently rely upon you to calm the storm, and prevent the Temple of Liberty being dashed to earth by the hurricane. We cannot, will not believe that we are or will be mistaken in those in whom we now place our trust. Methinks I hear a voice coming up from the lowly pillows of patriotism's immortal martyrs, saying, "Be of good cheer, all will yet be well." We cannot, will not believe that the respondent's unjust appeals will avail him now. He appeals to the truth of history to vindicate him in the acts of former Executives; but truth itself rises up from the midst of the mass of testimony here adduced, and says, even in this appeal he has polluted God's holy sanctuary; and when on justice he relies to protect him, and lift him up out of his difficulties, justice comes forward in all her majesty, and declares that he has not only trampled the laws of man but of God under foot. When he indirectly asks that the mantle of charity shall by you be thrown over his shortcomings and violations of law, clemency steps forward, and with a loud voice cries, "Forbearance has ceased to be a virtue;" "Mercy to this criminal would be cruelty to the state."

From the 14th day of April, 1865, to this day, as shown by the testimony,

Digitized by Google

he has been consistent only with himself, and the evil spirits of his administration. False to the people who took him from obscurity and conferred on him splendor; who dug him from that oblivion to which he had been consigned by the treason of his State, and gave him that distinction which, as disclosed by his subsequent acts, he never merited, and has so fearfully scandalized, disgraced, and dishonored; false to the memory of him whose death made him President; false to the principles of our contest for national life; false to the Constitution and laws of the land and his oath of office; filled with all vanity, lust, and pride; substituting, with the most disgusting self-complacency and ignorance, his own coarse, brutalized will for the will of the people, and substituting his vulgar, vapid, and ignorant utterances for patriotism, statesmanship and faithful public service, he has completed his circle of high crimes and misdemeanors; and, thanks to Almighty God, by the imbedded wisdom of our fathers found in the Constitution of our country, he stands to-day, with all his crimes upon his head, uncovered before the world, at the bar of this the most august tribunal on earth, to receive the awful sentence that awaits him as a fitting punishment for the crimes and misdemeanors of which he stands impeached by the House of Representatives, in the name and on behalf of all the people. Here, senators, we rest our case; here we leave the great criminal of the age. In your hands, as wisely provided by the charter of our liberties, this offender against the Constitution, the laws, liberty, peace, and public decency of our country, is now left to be finally and in the name of all the people, we humbly trust, disposed of forever, in such manner as no more to outrage the memories of an heroic and illustrious past, nor dim the hopes, expectations and glories of the coming future. Let us, we implore you, no more hear *his* resounding footfalls in the temple of American constitutional liberty, nor have the vessels of the ark of the covenant of our fathers polluted by his unholy hands Let not the blood of a half million of heroes who went to their deaths on the nation's battle-fields for the nation's life cry from the ground against us on account of the crimes permitted by us, and committed by him whom we now leave in your hands. Standing here to-day for the last time with my brother managers, to take leave of this case and this great tribunal, I am penetrated and overwhelmed with emotion. Memory is busy with the scenes of the years which have intervened between March 4th, 1861, and this day. Our great war, its battles and ten thousand incidents, without mental bidding and beyond control, almost pass in panoramic view before me. As in the presence of those whom I have seen fall in battle as we rushed to victory, or die of wounds or disease in hospital far from home and the loved ones, to be seen no more until the grave gives up its dead, have I endeavored to discharge my humble part in this great trial.

The world in after-times will read the history of the administration of Andrew Johnson as an illustration of the depth to which political and official perfidy can descend. Amid the unhealed ghastly scars of war; surrounded by the weeds of widowhood and cries of orphanage; associating with and sustained by the soldiers of the republic, of whom at one time he claimed to be one; surrounded by the men who had supported, aided, and cheered Mr. Lincoln through the darkest hours and sorest trials of his sad yet immortal administration—men whose lives had been dedicated to the cause of justice, law, and universal liberty—the men who had nominated and elected him to the second office in the nation at a time when he scarcely dared visit his own home because of the traitorous instincts of his own people; yet, as shown by his official acts, messages, speeches, conversations, and associations, almost from the time when the blood of Lincoln was warm on the floor of Ford's theatre, Andrew Johnson was contemplating treason to all the fresh fruits of the overthrown and crushed rebellion, and an affiliation with and a practical official and hearty sympathy for those who had cost hecatombs of slain citizens, billions of treasure, and an almost ruined coun-

try. His great aim and purpose has been to subvert law, usurp authority, insult and outrage Congress, reconstruct the rebel States in the interests of treason, insult the memories and resting-places of our heroic dead; outrage the feelings and deride the principles of the living men who aided in saving the Union, and deliver all snatched from wreck and ruin into the hands of unrepentant, but by him pardoned, traitors. But, all honor to the servants of a brave and loyal people, he has been in strict conformity to the Constitution arrested in his career of crime, impeached, arraigned, tried, and here awaits your sentence. We are not doubtful of your verdict. Andrew Johnson has long since been tried by the whole people and found guilty, and you can but confirm that judgment already pronounced by the sovereign American people.

Henceforth our career of greatness will be unimpeded. Rising from our baptism of fire and blood, purified by our sufferings and trials under the approving smiles of Heaven, and freed, as we are, from the crimes of oppression and wrong, the patriot heart looks outward and onward for long and ever increasing national prosperity, virtue, and happiness.

Hon. GEORGE S. BOUTWELL, on behalf of the managers, addressed the Senate, as follows:

Mr. President and Senators:

You may now anticipate the speedy conclusion of your arduous labors. The importance of this occasion is due to the unexampled circumstance that the Chief Magistrate of the principal republic of the world is on trial upon the charge that he is guilty of high crimes and misdemeanors in office. The solemnity of this occasion is due to the circumstance that this trial is a new test of our public national virtue and also of the strength and vigor of popular government. The trial of a great criminal is not an extraordinary event—even when followed by conviction and the severest penalty known to the laws. This respondent is not to be deprived of life, liberty, or property. The object of this proceeding is not the punishment of the offender, but the safety of the state. As the daily life of the wise and just magistrate is an example for good, cheering, encouraging, and strengthening all others, so the trial and conviction of a dishonest or an unfaithful officer is a warning to all men, and especially to such as occupy places of public trust.

The issues of record between the House of Representatives and Andrew Johnson, President of the United States, are technical and limited. We have met the issues, and, as we believe, maintained the cause of the House of Representatives by evidence, direct, clear, and conclusive. Those issues require you to ascertain and declare whether Andrew Johnson, President of the United States, is guilty of high crimes and misdemeanors as set forth in the several articles of impeachment exhibited against him, and especially whether he has violated the laws or the Constitution of the country in the attempt which he made on the 21st of February last to remove Edwin M. Stanton from the office of Secretary for the Department of War, and to appoint Lorenzo Thomas Secretary of War *ad interim*.

These are the issues disclosed by the record. They appear in the statement to be limited in their nature and character; but your final action thereon involves and settles questions of public policy of greater magnitude than any which have been considered in the political or judicial proceedings of the country since the adoption of the Constitution.

Mr. Johnson attempts to defend his conduct in the matter of the removal of Mr. Stanton by an assertion of "the power at any and all times of removing from office all executive officers for cause to be judged of by the President alone."

This claim manifestly extends to the officers of the army and of the navy, of the civil and the diplomatic service. He thus assumes and demands for himself

and for all his successors absolute control over the vast and yearly increasing patronage of this government. This claim has never been before asserted, and surely it has never been sanctioned; nor is there a law or usage which furnishes any ground for justification, even the least.

Heretofore the Senate has always been consulted in regard to appointments, and during the sessions of the Senate it has always been consulted in regard to removals from office. The claim now made, if sanctioned, strips the Senate of all practical power in the premises, and leaves the patronage of office, the revenues and expenditures of the country in the hands of the President alone. Who does not see that the power of the Senate to act upon and confirm a nomination is a barren power, as a means of protecting the public interests, if the person so confirmed may be removed from his office at once without the advice and consent of the Senate? If this claim shall be conceded the President is clothed with power to remove every person who refuses to become his instrument.

An evil-minded President may remove all loyal and patriotic officers from the army, the navy, the civil and the diplomatic service, and nominate only his adherents and friends. None but his friends can remain in office; none but his friends can be appointed to office. What security remains for the fidelity of the army and the navy? What security for the collection of the public revenues? What accountability remains in any branch of the public service? Every public officer is henceforth a mere dependent upon the Executive. Heretofore the Senate could say to the President you shall not remove a faithful, honest public officer. This power the Senate has possessed and exercised for nearly eighty years, under and by virtue of express authority granted in the Constitution. Is this authority to be surrendered? Is this power of the Senate, this prerogative we may almost call it, to be abandoned? Has the country, has the Senate, in the exercise of its legislative, executive, or judicial functions, fully considered these broader and graver issues touching and affecting vitally our institutions and system of government?

The House of Representatives has brought Andrew Johnson, President of the United States, to the bar of this august tribunal, and has here charged him with high crimes and misdemeanors in office. He meets the charge by denying and assailing the ancient, undoubted, constitutional powers of the Senate. This is the grave, national, historical, constitutional issue. When you decide the issues of record, which appear narrow and technical, you decide these greater issues also.

The managers on the part of the House of Representatives, as time and their abilities may permit, intend to deal with the criminal and with these, his crimes, and also to examine the constitutional powers of the President and of the Senate. I shall first invite your attention, senators, to the last-mentioned topics.

It is necessary, in this discussion, to consider the character of the government, and especially the distribution of powers and the limitations placed by the Constitution upon the executive, judicial, and legislative departments.

The tenth amendment to the Constitution provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This provision is not to be so construed as to defeat the objects for which the Constitution itself was established; and it follows, necessarily, that the three departments of the government possess sufficient power, collectively, to accomplish those objects.

It will be seen from an examination of the grants of power made to the several departments of the government that there is a difference in the phraseology employed, and that the legislative branch alone is intrusted with discretionary authority. The first section of the first article provides that "all legislative

Digitized by Google

powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The first section of the second article provides that "the executive power shall be vested in a President of the United States of America;" and the first section of the third article provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." The words "herein granted," as used in the first section of the first article of the Constitution, are of themselves words of limitation upon the legislative powers of Congress, confining those powers within the authority expressed in the Constitution. The absence of those words in the provisions relating to the executive and judicial departments does not, as might at first be supposed, justify the inference that unlimited authority is conferred upon those departments. An examination of the Constitution shows that the executive and judicial departments have no inherent vigor by which, under the Constitution, they are enabled to perform the functions delegated to them, while the legislative department, in noticeable contrast, is clothed with authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, *and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof.*"

By virtue of this provision the Constitution devolves upon Congress the duty of providing by legislation for the full execution, not only of the powers vested in Congress, but also of providing by legislation for the execution of those powers which by the Constitution are vested in the executive and judicial departments. The legislative department has original power derived from the Constitution, by which it can set and keep itself in motion as a branch of the government, while the executive and judicial departments have no self-executing constitutional capacity, but are constantly dependent upon the legislative department. Nor does it follow, as might upon slight attention be assumed, that the executive power given to the President is an unlimited power, or that it answers or corresponds to the powers which have been or may be exercised by the executive of any other government. The President of the United States is not endowed by the Constitution with the executive power which was possessed by Henry VIII or Queen Elizabeth, or by any ruler in any other country or time, but only with the power expressly granted to him by the Constitution, and with such other powers as have been conferred upon him by Congress, for the purpose of carrying into effect the powers which are granted to the President by the Constitution. Hence it may be asserted that whenever the President attempts to exercise any power, he must, if his right be questioned, find a specific authority in the Constitution or laws. By the Constitution he is Commander-in-chief of the army and navy; but it is for Congress to decide, in the first place, whether there shall be an army or navy, and the President must command the army or navy as it is created by Congress, and subject, as is every other officer of the army or navy, to such rules and regulations as Congress may from time to time establish.

The President "may require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices," but the executive offices themselves are created by Congress, and the duties of each officer are prescribed by law. In fine, the power to set the government in motion and to keep it in motion is lodged exclusively in Congress, under the provisions of the Constitution.

By our system of government the sovereignty is in the people of the United States, and that sovereignty is fully expressed in the preamble to the Constitution. By the Constitution the people have vested discretionary power—limited, it is true—in the Congress of the United States, while they have denied to the executive and judicial departments all discretionary or implied power whatever.

Digitized by Google

The nature and extent of the powers conferred by the Constitution upon Congress have been clearly and fully set forth by the Supreme Court. (McCulloch *vs.* the State of Maryland, 4th Wheaton, pp. 409 and 420.) The court, in speaking of the power of Congress, say: "The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means." Again, they say: "We admit, as all must admit, that the powers of the government are limited, and that these limits are not to be transcended; but we think the sound construction of the Constitution must allow to *the national legislature* that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the thing be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to the end, which are not prohibited, and consistent with the letter and spirit of the Constitution, are constitutional."

It is also worthy of remark, in this connection, that the article which confers legislative powers upon the Congress of the United States declares that *all* legislative powers herein granted, that is, granted in the Constitution, shall be vested in the Congress of the United States; while in the section relating to the powers of the President it is declared that *the* executive power shall be vested in a President of the United States of America. The inference from this distinction is in harmony with what has been previously stated. "The executive power" spoken of is that which is conferred upon the President by the Constitution, and it is limited by the terms of the Constitution, and must be exercised in the manner prescribed by the Constitution. The words used are to be interpreted according to their ordinary meaning.

It is also worthy of remark that the Constitution, in terms, denies to Congress various legislative powers specified. It denies also to the United States various powers, and various powers enumerated are likewise denied to the States. There is but one denial of power to the President, and that is a limitation of an express power granted. The single instance of a denial of power to the President is in that provision of the Constitution wherein he is authorized "to grant reprieves and pardons for offences against the United States, except in cases of impeachment." As the powers granted to the President are specified, and as he takes nothing by implication or inference, there was no occasion to recite or enumerate powers not delegated to him. As the Constitution clothes Congress with powers of legislation which are ample for all the necessities of national life, wherein there is opportunity for the exercise of a wide discretion, it was necessary to specify such powers as are prohibited to Congress. The powers of Congress are ascertained by considering as well what is prohibited as what is granted; while the powers of the Executive are to be ascertained clearly and fully by what is granted. Where there is nothing left to inference, implication, or discretion, there is no necessity for clauses or provisions of inhibition. In the single case of the grant of the full power of pardon to the President, a power unlimited in its very nature, the denial of the power to pardon in case of impeachment became necessary. This example fully illustrates and establishes the position to which I now ask your assent. If this view be correct it follows necessarily, as has been before stated, that the President, acting under the Constitution, can exercise those powers only which are specifically conferred upon him, and can take nothing by construction, by implication, or by what is sometimes termed the necessity of the case.

But in every government there should be in its constitution capacity to adapt the administration of affairs to the changing conditions of national life. In the government of the United States this capacity is found in Congress, in virtue of the provision already quoted, by which Congress is authorized "to make all laws which shall be necessary and proper for carrying into execution the fore-

going powers, (*i. e.*, the powers given to Congress,) and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

It is made the duty of the President, "from time to time, to give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient."

Provision is also made in the Constitution for his co-operation in the enactment of laws. Thus it is in his power to lay before Congress the reasons which, in his opinion, may at any time exist for legislative action in aid of the executive powers conferred by the Constitution upon the President; and under the ample legislative powers secured to Congress by the provision already quoted, there is no reason in the nature of the government why the constitutional and lawful powers of the Executive may not be made adequate to every emergency of the country. In fine, the President may be said to be governed by the principles which govern the judge in a court of law. He must take the law and administer it as he finds it without any inquiry on his part as to the wisdom of the legislation. So the President, with reference to the measure of his own powers, must take the Constitution and the laws of the country as they are, and be governed strictly by them. If, in any particular, by implication or construction, he assumes and exercises authority not granted to him by the Constitution or the laws, he violates his oath of office, by which, under the Constitution, it is made his duty "to take care that the laws be faithfully executed," which implies necessarily that he can go into no inquiry as to whether the laws are expedient or otherwise; nor is it within his province, in the execution of the law, to consider whether it is constitutional. In his communications to Congress he may consider and discuss the constitutionality of existing or proposed legislation, and when a bill is passed by the two houses and submitted to him for approval, he may, if in his opinion the same is unconstitutional, return it to the house in which it originated with his reasons. In the performance of these duties he exhausts his constitutional power in the work of legislation. If, notwithstanding his objections, Congress, by a two-thirds majority in each house, shall pass the bill, it is then the duty of the President to obey and execute it, as it is his duty to obey and execute all laws which he or his predecessors may have approved.

If a law be in fact unconstitutional it may be repealed by Congress, or it may, possibly, when a case duly arises, be annulled in its unconstitutional features by the Supreme Court of the United States. The repeal of the law is a legislative act; the declaration by the court that it is unconstitutional is a judicial act; but the power to repeal, or to annul, or to set aside a law of the United States, is in no aspect of the case an executive power. It is made the duty of the Executive to take care that the laws be faithfully executed—an injunction wholly inconsistent with the theory that it is in the power of the Executive to repeal, or annul, or dispense with the laws of the land. To the President in the performance of his executive duties all laws are alike. He can enter into no inquiry as to their expediency or constitutionality. All laws are presumed to be constitutional, and whether in fact constitutional or not, it is the duty of the Executive so to regard them while they have the form of law. When a statute is repealed for its unconstitutionality, or for any other reason, it ceases to be law in form and in fact. When a statute is annulled in whole or in part by the opinion of a competent judicial tribunal, from that moment it ceases to be law. But the respondent and the counsel for the respondent will seek in vain for any authority or color of authority in the Constitution or the laws of the country by which the President is clothed with power to make any distinction upon his own judgment, or upon the judgment of any friends or advisers, whether private or official persons, between the several statutes of the country, each and every one of which he is, by the Constitution and by hi-

oath of office, required faithfully to execute. Hence it follows that the crime of the President is not, either in fact or as set forth in the articles of impeachment, that he has violated a constitutional law; but his crime is that he has violated a law, and in his defence no inquiry can be made whether the law is constitutional; for inasmuch as he had no constitutional power to inquire for himself whether the law was constitutional or not, so it is no excuse for him that he did unlawfully so inquire and came to the conclusion that the law was unconstitutional.

It follows, from the authorities already quoted, and the positions founded thereon, that there can be no inquiry here and now by this tribunal whether the act in question—the act entitled "An act regulating the tenure of certain civil offices"—is in fact constitutional or not. It was and is the law of the land. It was enacted by a strict adherence to constitutional forms. It was, and is, binding upon all the officers and departments of the government. The Senate, for the purpose of deciding whether the respondent is innocent or guilty, can enter into no inquiry as to the constitutionality of the act, which it was the President's duty to execute, and which, upon his own answer, and by repeated official confessions and admissions, he intentionally, wilfully, deliberately set aside and violated.

If the President, in the discharge of his duty "to take care that the laws be faithfully executed," may inquire whether the laws are constitutional, and execute those only which he believes to be so, then, for the purposes of government, his will or opinion is substituted for the action of the law-making power, and the government is no longer a government of laws, but the government of one man. This is also true, if, when arraigned, he may justify by showing that he has acted upon advice that the law was unconstitutional. Further, if the Senate sitting for the trial of the President may inquire and decide whether the law is in fact constitutional, and convict the President if he has violated an act believed to be constitutional, and acquit him if the Senate think the law unconstitutional, then the President is in fact tried for his judgment, to be acquitted if in the opinion of the Senate it was a correct judgment, and convicted if in the opinion of the Senate his judgment was erroneous. This doctrine offends every principle of justice. His offence is that he intentionally violated a law. Knowing its terms and requirements, he disregarded them.

With deference I maintain still further, that it is not the right of any senator in this trial to be governed by any opinion he may entertain of the constitutionality or expediency of the law in question. For the purposes of this trial the statute which the President, upon his own confession, has repeatedly violated is the law of the land. His crime is that he violated the law. It has not been repealed by Congress; it has not been annulled by the Supreme Court; it stands upon the statute-book as the law; and for the purposes of this trial it is to be treated by every senator as a constitutional law. Otherwise it follows that the President of the United States, supported by a minority exceeding by one a third of this Senate, may set aside, disregard, and violate all the laws of the land. It is nothing to this respondent, it is nothing to this Senate, sitting here as a tribunal to try and judge this respondent, that the senators participated in the passage of the act, or that the respondent, in the exercise of a constitutional power, returned the bill to the Senate with his objections thereto. The act itself is as binding, is as constitutional, is as sacred in the eye of the Constitution as the acts that were passed at the first session of the first Congress. If the President may refuse to execute a law because in his opinion it is unconstitutional, or for the reason that, in the judgment of his friends and advisers, it is unconstitutional, then he and his successors in office may refuse to execute any statute the constitutionality of which has not been affirmatively settled by the Supreme Court of the United States. If a minority, exceeding one-third of this Senate by one, may relieve the President from all

responsibility for this violation of his oath of office, because they concur with him in the opinion that this legislation is either unconstitutional or of doubtful constitutionality, then there is no security for the execution of the laws. The constitutional injunction upon the President is to take care that the laws be faithfully executed; and upon him no power whatsoever is conferred by the Constitution to inquire whether the law that he is charged to execute is or is not constitutional. The constitutional injunction upon you, in your present capacity, is to hold the respondent faithfully to the execution of the constitutional trusts and duties imposed upon him. If he has wilfully disregarded the obligation resting upon him, to take care that the laws be faithfully executed, then the constitutional duty imposed upon you is to convict him of the crime of having wilfully disregarded the laws of the land and violated his oath of office.

I indulge, Senators, in great plainness of speech, and pursue a line of remark which, were the subject less important or the duty resting upon us less solemn, I should studiously avoid. But I speak with every feeling and sentiment of respect for this body and this place of which my nature is capable. In my boyhood, from the gallery of the old chamber of the Senate, I looked, not with admiration merely, but with something of awe upon the men of that generation who were then in the seats which you now fill. Time and experience may have modified and chastened those impressions, but they are not, they can not, be obliterated. They will remain with me while life remains. But, with my convictions of my own duty, with my convictions of your duty, with my convictions of the danger, the imminent peril, to our country if you should not render a judgment of guilty against this respondent, I have no alternative but to speak with all the plainness and directness which the most earnest convictions of the truth of what I utter can inspire.

Nor can the President prove or plead the motive by which he professes to have been governed in his violation of the laws of the country. Where a positive specific duty is imposed upon a public officer, his motives can not be good if he wilfully neglects or refuses to discharge his duty in the manner in which it is imposed upon him. In other words, it is not possible for a public officer, and particularly for the President of the United States, who is under a special constitutional injunction to discharge his duty faithfully, to have any motive except a bad motive, if he wilfully violates his duty. A judge, to be sure, in the exercise of a discretionary power, as in imposing a sentence upon a criminal where the penalty is not specific, may err in the exercise of that discretion and plead properly his good motives in the discharge of his duty. That is, he may say that he intended, under the law, to impose a proper penalty; and inasmuch as that was his intention, though all other men may think that the penalty was either insufficient or excessive, he is fully justified by his motives.

So the President, having vested in him discretionary power in regard to granting pardons, might, if arraigned for the improper exercise of that power in a particular case, plead and prove his good motives, although his action might be universally condemned as improper or unwise in that particular case. But the circumstances of this respondent are wholly different. The law which, as he admits, he has intentionally and deliberately violated, was mandatory upon him, and left in his hands no discretion as to whether he would, in a given case, execute it or not.

A public officer can neither plead nor prove good motives to refute or control his own admission that he has intentionally violated a public law.

Take the case of the President; his oath is: "I do solemnly swear that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution of the United States." One of the provisions of that Constitution is, that the President shall "take care that the laws be faithfully executed." In this injunction there are no qualifying words. It is made his duty to take care that the *laws*,

the laws, be faithfully executed. A law is well defined to be "a rule laid, set, or established by the law-making power of the country." It is of such rules that the Constitution speaks in this injunction to the President; and in obedience to that injunction, and with reference to his duty under his oath to take care that the laws be faithfully executed, he can enter into no inquiry as to whether those laws are expedient or constitutional, or otherwise. And inasmuch as it is not possible for him, under the Constitution, to enter lawfully into any such inquiry, it is alike impossible for him to plead or to prove that, having entered into such inquiry, which was in itself unlawful, he was governed by a good motive in the result which he reached, and in his action thereupon. Having no right to inquire whether the laws were expedient or constitutional, or otherwise, if he did so inquire, and if upon such inquiry he came to the conclusion that, for any reason, he would not execute the law according to the terms of the law, then he wilfully violated his oath of office and the Constitution of the United States. The necessary, the inevitable presumption in law is, that he acted under the influence of bad motives in so doing, and no evidence can be introduced controlling or coloring in any degree this necessary presumption of the law.

Having, therefore, no right to entertain any motive contrary to his constitutional obligation to execute the laws, he cannot plead his motive. Inasmuch as he can neither plead nor prove his motive, the presumption of the law must remain that in violating his oath of office and the Constitution of the United States he was influenced by a bad motive. The magistrate who wilfully breaks the laws, in violation of his oath to execute them, insults and outrages the common sense and the common nature of his countrymen when he asserts that their laws are so bad that they deserve to be broken. This is the language of a defiant usurper, or of a man who has surrendered himself to the counsel and control of the enemies of his country.

If a President, believing a law to be unconstitutional, may refuse to execute it, then your laws for the reconstruction of the Southern States, your laws for the collection of the internal revenue, your laws for the collection of custom-house duties, are dependent, for their execution, upon the individual opinion of the President as to whether they are constitutional or not; and if these laws are so dependent, all other laws are equally dependent upon the opinion of the Executive. Hence it follows that whatever the legislation of Congress may be, the laws of the country are to be executed only so far as the President believes them to be constitutional. This respondent avers that his sole object in violating the tenure-of-office act was to obtain the opinion of the Supreme Court upon the question of the constitutionality of that law. In other words, he deliberately violated the law, which was in him a crime, for the purpose of ascertaining judicially whether the law could be violated with impunity or not. At that very time, he had resting upon him the obligations of a citizen to obey the laws, and the higher and more solemn obligation, imposed by the Constitution upon the first magistrate of the country, to execute the laws. If a private citizen violates a law, he does so at his peril. If the President, or Vice-President, or any other civil officer, violates a law, his peril is that he may be impeached by the House of Representatives and convicted by the Senate. This is precisely the responsibility which the respondent has incurred; and it would be no relief to him for his wilful violation of the law, in the circumstances in which he is now placed, if the court itself had pronounced the same to be unconstitutional. But it is not easy to comprehend the audacity, the criminal character of a proceeding by which the President of the United States attempts systematically to undermine the government itself by drawing purposely into controversy, in the courts and elsewhere, the validity of the laws enacted by the constituted authorities of the country, who, as much as himself, are individually under an obligation to obey the Constitution in all their public acts. With the same reason,

and for the same object, he might violate the reconstruction laws, tax laws, tariff acts, or the neutrality laws of the country; and thus, in a single day of his official life, raise questions which could not be disposed of for years in the courts of the country. The evidence discloses the fact that he has taken no step for the purpose of testing the constitutionality of the law. He suspended numerous officers under, or if not under, at least, as he himself admits, in conformity with the tenure-of-office law, showing that it was not his sole object to test its constitutionality. He has had opportunity to make application through the Attorney General for a writ of *quo warranto*, which might have tested the validity of the law in the courts. This writ is the writ of the government, and it can never be granted upon the application of a private person. The President has never taken one step to test the law in the courts. Since his attempted removal of Mr. Stanton on the 21st of February last, he might have instituted proceedings by a writ of *quo warranto*, and by this time have obtained, probably, a judicial opinion covering all the points of the case. But he shrinks from the test he says he sought. Thus is the pretext of the President fully exposed. The evidence shows that he never designed to test the law in the courts. His object was to seize the offices of the government for purposes of corruption, and by their influence to enable him to reconstruct the Union in the interest of the rebellious States. In short, he resorted to this usurpation as an efficient and necessary means of usurping all power and of restoring the government to rebel hands.

No criminal was ever arraigned who offered a more unsatisfactory excuse for his crimes. The President had no right to do what he says he designed to do, and the evidence shows that he never has attempted to do what he now assigns as his purpose when he trampled the laws of his country under his feet.

These considerations have prepared the way in some degree, I trust, for an examination of the provisions of the Constitution relating to the appointment of embassadors and other public ministers and consuls, judges of the Supreme Court, and other officers of the United States, for whose appointment provision is made in the second section of the second article of the Constitution. It is there declared that the President "shall nominate," and, by and with the consent of the Senate, shall "appoint embassadors and other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law." The phrase, "are not herein otherwise provided for," is understood to refer to senators, who, under the Constitution, in case of a vacancy, may be appointed by the governors of the several States, and to those appointments which might be confided by law to the courts or to the heads of departments. It is essential to notice the fact that neither in this provision of the Constitution nor in any other is power given to the President to remove any officer. The only power of removal specified in the Constitution is that of the Senate, by its verdict of guilty, to remove the President, Vice-President, or other civil officer who may be impeached by the House of Representatives and presented to the Senate for trial.

Upon the premises already laid down it is clear that the power of removal from office is not vested in the President alone, but only in the President by and with the advice and consent of the Senate. Applying the provision of the Constitution already cited to the condition of affairs existing at the time the government was organized, we find that the course pursued by the first Congress and by the first President was the inevitable result of the operation of this provision of the organic law. In the first instance, several executive departments were established by acts of Congress, and in those departments offices of various grades were created. The conduct of foreign affairs required the appointment of ambassadors, ministers, and consuls, and consequently those necessary offices were established by law. The President, in conformity with this provision of the Constitution, made nominations to the Senate of persons to fill the various

offices so established. These nominations were considered and acted upon by the Senate, and when confirmed by the Senate the persons so nominated were appointed and authorized by commissions under the hand of the President to enter upon the discharge of their respective duties. In the nature of the case it was not possible for the President, during a session of the Senate, to assign to duty in any of the offices so created any person who had not been by him nominated to the Senate and by that body confirmed, and there is no evidence that any such attempt was made. The persons thus nominated and confirmed were in their offices under the Constitution, and by virtue of the concurrent action of the President and the Senate. There is not to be found in the Constitution any provision contemplating the removal of such persons from office. But inasmuch as it is essential to the proper administration of affairs that there should be a power of removal, and inasmuch as the power of nomination and confirmation vested in the President and in the Senate is a continuing power, not exhausted either by a single exercise or by a repeated exercise in reference to a particular office, it follows legitimately and properly that the President might at any time nominate to the Senate a person to fill a particular office, and the Senate in the exercise of its constitutional power could confirm that nomination, that the person so nominated and confirmed would have a right to take and enjoy the office to which he had been so appointed, and thus to dispossess the previous incumbent. It is apparent that no removal can be made unless the President takes the initiative, and hence the expression, "removal by the President."

As, by a common and universally recognized principle of construction, the most recent statute is obligatory and controlling wherever it contravenes a previous statute, so a recent commission, issued under an appointment made by and with the advice and consent of the Senate, supersedes a previous appointment although made in the same manner. It is thus apparent that there is, under and by virtue of the clause of the Constitution quoted, no power of removal vested either in the President or in the Senate, or in both of them together as an independent power; but it is rather a consequence of the power of appointment. And as the power of appointment is not vested in the President, but only the right to make a nomination, which becomes an appointment only when the nomination has been confirmed by the Senate, the power of removing a public officer cannot be deemed an executive power solely within the meaning of this provision of the Constitution.

This view of the subject is in harmony with the opinion expressed in the seventy-sixth number of the Federalist. After stating with great force the objections which exist to the "exercise of the power of appointing to office by an assembly of men," the writer proceeds to say:

> The truth of the principles here advanced seems to have been felt by the most intelligent of those who have found fault with the provision made in this respect by the convention. They contend that the President ought solely to have been authorized to make the appointments under the Federal government. But it is easy to show that every advantage to be expected from such an arrangement would in substance be derived from the power of *nomination*, which is proposed to be conferred upon him, while several disadvantages which might attend the absolute power of appointment in the hands of that officer would be avoided. In the act of nominating his judgment alone would be exercised, and as it would be his sole duty to point out the man who with the approbation of the Senate should fill an office, his responsibility would be as complete as if he were to make the final appointment. There can, in this view, be no difference between nominating and appointing. The same motives which would influence a proper discharge of his duty in one case would exist in the other; and as no man could be appointed but upon his previous nomination, every man who might be appointed would be in fact his choice.
>
> But his nomination may be overruled. This it certainly may, yet it can only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though, perhaps not in the highest degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted by the preference they might feel to another to reject the one proposed, because they could not assure themselves that the person they might wish would be brought forward by a sec-

ond, or by any subsequent nomination. They could not even be certain that a future nomination would present a candidate in any degree more acceptable to them. And as their dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the Chief Magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.

To what purpose then require the co-operation of the Senate? I answer that the necessity of their concurrence would have a powerful, though in general, a silent operation. It would be an excellent check upon the spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters, from State prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration.

It will readily be comprehended that a man who had himself the sole disposition of office would be governed much more by his private inclinations and interests than when he was bound to submit the propriety of his choice to the dictation and determination of a different and independent body, and that body an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger of his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to one and to the other. He would be both ashamed and afraid to bring forward for the most distinguished or lucrative stations candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, and possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.

When the President has made a nomination for a particular office, and that nomination has been confirmed by the Senate, the constitutional power of the President during the session of the Senate is exhausted with reference to that officer. All that he can do under the Constitution is, in the same manner to nominate a successor, who may be either confirmed or rejected by the Senate. Considering the powers of the President exclusively with reference to the removal and appointment of civil officers during the session of the Senate, it is clear that he can only act in concurrence with the Senate. An office being filled, he can only nominate a successor, who, when confirmed by the Senate, is, by operation of the Constitution, appointed to the office, and it is the duty of the President to issue his commission accordingly. This commission operates as a *supersedeas*, and the previous occupant is thereby removed.

No legislation has attempted to enlarge or diminish the constitutional powers of the President, and no legislation can enlarge or diminish his constitutional powers in this respect, as I shall hereafter show. It is here and now in the presence of this provision of the Constitution concerning the true meaning, of which there neither is nor has ever been any serious doubt in the mind of any lawyer or statesman, that we strip the defence of the President of all the questions and technicalities which the intellects of men, sharpened but not enlarged by the practice of the law, have wrung from the legislation of the country covering three-fourths of a century.

On the 21st day of February last Mr. Stanton was *de facto* and *de jure* Secretary for the Department of War. The President's letter to Mr. Stanton, of that date, is evidence of this fact:

EXECUTIVE MANSION,
Washington, D. C., February 21, 1868.

SIR: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon receipt of this communication.

You will transfer to Brevet Major General Lorenzo Thomas, Adjutant General of the army, who has this day been authorized and empowered to act as Secretary of War *ad interim*, all records, books, papers, and other public property now in your custody and charge.

Respectfully, yours,

ANDREW JOHNSON.

Hon. EDWIN M. STANTON, *Washington, D. C.*

This letter is an admission, not only that Mr. Stanton was Secretary of War on the 21st of February, 1868, but also that the suspension of that officer of the

12th of August, A. D. 1867, whether made under the tenure-of-office act or not, was abrogated by the action of the Senate of the 13th of January, 1868, and that then Mr. Stanton thereby was restored lawfully to the office of Secretary for the Department of War.

On the 21st day of February the Senate was in session. There was then but one constitutional way for the removal of Mr. Stanton: a nomination by the President to the Senate of a successor, and his confirmation by that body. The President attempted to remove Mr. Stanton in a way not known to the Constitution, and in violation thereof, by issuing the said order for his removal. In the first of the articles it is set forth that this order was issued "in violation of the Constitution and of the laws of the United States," and the President is consequently guilty under this article; we have proved a violation either of the Constitution or the laws. If we show that he has violated the Constitution of the United States, we show also that he has violated his oath of office, which pledged him to support the Constitution. Thus is the guilt of the President, under the Constitution and upon admitted facts, established beyond a reasonable doubt. This view is sufficient to justify and require at your hands a verdict of guilty under the first article, and this without any reference to the legislation of the country, and without reference to the constitutionality of the tenure-of-office act or to the question whether the Secretary of War is included within its provisions or not. But I intend in the course of my argument to deal with all these questions of law, and to apply the law as it shall appear to the facts proved or admitted. To be sure, in my judgment the case presented by the House of Representatives in the name of all the people of the United States might safely be rested here; but the cause of justice, the cause of the country, requires us to expose and demonstrate the guilt of the President in all the particulars set forth in the articles of impeachment. We have no alternative but to proceed. In this connection I refer to a view presented by the counsel for the President in his opening argument. He insists, or suggests, that inasmuch as the letter to Stanton of the 21st of February did not, in fact, accomplish a removal of the Secretary, that therefore no offence was committed. The technicalities of the law have fallen into disrepute among the people, and sometimes even in the courts. The technicalities proper of the law are the rules developed by human experience, and justly denominated, as is the law itself, the perfection of human reason. These rules, wise though subtle, aid in the administration of justice in all tribunals where the laws are judicially administered. But it often happens that attorneys seek to confuse the minds of men, and thwart the administration of justice, by the suggestion of nice distinctions which have no foundation in reason, and find no support in general principles of right.

The President cannot assume to exercise a power, as a power belonging to the office he holds, there being no warrant in law for such exercise, and then plead that he is not guilty because the act undertaken was not fully accomplished. The President is as guilty in contemplation of law as he would have been if Mr. Stanton had submitted to his demand and retired from the office of Secretary for the Department of War. Nothing more possible remained for the President except a resort to force, and what he did and what he contemplated doing to obtain possession of the office by force will be considered hereafter.

If these views are correct, the President is wholly without power, under and by virtue of the Constitution, to suspend a public officer. And most assuredly nothing is found in the Constitution to sustain the arrogant claim which he now makes, that he may during a session of the Senate suspend a public officer indefinitely and make an appointment to the vacancy thus created without asking the advice and consent of the Senate either upon the suspension or the appointment.

Digitized by Google

I pass now to the consideration of the third clause of the second section of the second article of the Constitution:

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

The phrase, "may happen," construed according to the proper and well-understood meaning of the words when the Constitution was framed, referred to those vacancies which might occur independently of the will of the government—vacancies arising from death, from resignation, from circumstances not produced by the act of the appointing power. The words "happen" and "happened" are of frequent use in the Bible, "that well of pure English undefiled," and always in the sense of accident, fortuity, chance, without previous expectation, as to befall, to light, to fall, or to come unexpectedly. This clause of the Constitution contains a grant of power to the President, and under and by virtue of it he may take and exercise the power granted, but nothing by construction or by implication. He then, by virtue of his office, may, during the recess of the Senate, grant commissions which shall expire at the end of the next session, and thus fill up any vacancies that may happen, that is, that may come by chance, by accident, without any agency on his part.

If, then, it be necessary and proper, as undoubtedly it is necessary and proper, that provision should be made for the suspension or temporary removal of officers who, in the recess of the Senate, have proved to be incapable or dishonest, or who in the judgment of the President are disqualified for the further discharge of the duties of their offices, it is clearly a legislative right and duty, under the clause of the Constitution which authorizes Congress "to make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all other powers vested in the government of the United States, or in any department or officer thereof," to provide for the contingency. It is no answer to this view of the case to say that until the second of March, 1867, Congress neglected to legislate upon this subject, and that during the long period of such neglect, by the advice of Attorneys General, the practice was introduced and continued, by which the President, during the recess of the Senate, removed from office persons who had been nominated by the President and confirmed by the Senate. This practice having originated in the neglect of Congress to legislate upon a subject clearly within its jurisdiction, and only tolerated by Congress, has, at most, the force of a practice or usage, which can at any time be annulled or controlled by statute.

This view is also sustained by the reasoning of Hamilton, in the 67th number of the Federalist, in which he says:

The last of these two clauses, it is equally clear, cannot be understood to comprehend the power of filling vacancies in the Senate, for the following reasons: *First*, the relation in which that clause stands to the other, which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other, for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate. The ordinary power of appointment is confided to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, *singly*, to make temporary appointments "during the recess of the Senate, by granting commissions which should expire at the end of their next session."

The arguments which I have thus offered and the authorities quoted show that the President had not the power during the session of the Senate to remove either the Secretary of War or any civil officer from office by virtue of the Constitution. The power of removal during the recess of the Senate was recognized by the act of 1789, and tolerated by the country upon the opinions of Attorneys General till 1867. The President claims, however, and as an incident of the

power of removal, the power to suspend from office indefinitely any officer of the government; but inasmuch as his claim to the power of removal is not supported by the Constitution, he cannot sustain any other claim as an incident of that power. But if the power to remove were admitted, it would by no means follow that the President has the power to suspend indefinitely. The power to suspend indefinitely is a different power from that of removal, and it is in no proper sense necessarily an incident. It might be very well conceived that if the framers of the Constitution had thought fit to confer upon the President the power to remove a public officer absolutely, his removal to be followed by the nomination of a successor to the Senate, they might yet have denied to the President the power to suspend public officers indefinitely and to supply their places by his appointees without the advice and consent of the Senate. But, inasmuch as the power to suspend indefinitely is not a power claimed as a specific grant under the Constitution, and as the claim by the President of the power of removal during a session of the Senate is not sustained by the text of the Constitution or by any good authority under it, it is not important to consider whether, if the power of removal were admitted to exist, the power to suspend indefinitely could be considered as an incident. It is sufficient to say that neither power, in the sense claimed by the President, exists under the Constitution or by any provision of law.

I respectfully submit, Senators, that there can be no reasonable doubt of the soundness of the view I have presented, both of the language and meaning of the Constitution in regard to appointments to office. But, if there were any doubt, it is competent and proper to consider the effects of the claim, if recognized, as set up by the President. And in a matter of doubt as to the construction of the phraseology of the Constitution, it would be conclusive of its true interpretation that the claim asserted by the President is fraught with evils of the gravest character. He claims the right, as well when the Senate is in session as when it is not in session, to remove absolutely, or to suspend for an indefinite period of time, according to his own discretion, every officer of the army, of the navy, and of the civil service, and to supply their places with creatures and partisans of his own. To be sure, he has not asserted, in direct form, his right to remove and suspend indefinitely officers of the army and navy; but when you consider that the Constitution makes no distinction in the tenure of office between military, naval and civil officers; that all are nominated originally by the President and receive their appointments upon the confirmation of the Senate, and hold their offices under the Constitution by no other title than that which secures to a cabinet officer or to a revenue collector the office to which he has been appointed, there can be no misunderstanding as to the nature, extent, and dangerous character of the claim which the President makes. The statement of this arrogant and dangerous assumption is a sufficient answer to any doubt which might exist in the mind of any patriot as to the true intent and meaning of the Constitution. It cannot be conceived that the men who framed that instrument, who were devoted to liberty, who had themselves suffered by the exercise of illegal and irresponsible power, would have vested in the President of the United States an authority, to be exercised without the restraint or control of any other branch or department of the government, which would enable him to corrupt the civil, military, and naval officers of the country by rendering them absolutely dependent for their positions and emoluments upon his will. At the present time there are 41,000 officers, whose aggregate emoluments exceed $21,000,000 per annum. To all these the President's claim applies. These facts express the practical magnitude of the subject. Moreover, this claim was never asserted by any President, or by any public man, from the beginning of the government until the present time. It is in violation also of the act of July 13, 1866, which denies to the Executive the power to remove officers of the army and the navy, except upon sentence of a court-martial. The history of the career of Andrew

Johnson shows that he has been driven to the assertion of this claim by circumstances and events connected with his criminal design to break down the power of Congress, to subvert the institutions of the country, and thereby to restore the Union in the interest of those who participated in the rebellion. Having entered upon this career of crime, he soon found it essential to the accomplishment of his purposes to secure the support of the immense retinue of public officers of every grade and description in the country. This he could not do without making them entirely dependent upon his will; and in order that they might realize their dependence, and thus be made subservient to his purposes, he determined to assert an authority over them unauthorized by the Constitution, and theretofore not attempted by any Chief Magistrate. His conversation with Mr. Wood, in the autumn of 1866, fully discloses this purpose.

Previous to the passage of the tenure-of-office act he had removed hundreds of faithful and patriotic public officers, to the great detriment of the public service, and followed by an immense loss of the public revenues. At the time of the passage of the act he was so far involved in his mad schemes—schemes of ambition and revenge—that it was, in his view, impossible for him to retrace his steps. He consequently determined, by various artifices and plans, to undermine that law and secure to himself, in defiance of the will of Congress and of the country, entire control of the officers in the civil service, and in the army and the navy. He thus became gradually involved in an unlawful undertaking, from which he could not retreat. In the presence of the proceedings against him by the House of Representatives he had no alternative but to assert that under the Constitution power was vested in the President exclusively, without the advice and consent of the Senate, to remove from office every person in the service of the country. This policy, as yet acted upon in part, and developed chiefly in the civil service, has already produced evils which threaten the overthrow of the government. When he removed faithful public officers, and appointed others whose only claim to consideration was their unreasoning devotion to his interest and unhesitating obedience to his will, they compensated themselves for this devotion and this obedience by frauds upon the revenues, and by crimes against the laws of the land. Hence it has happened that in the internal revenue service alone—chiefly through the corruption of men whom he has thus appointed—the losses have amounted to not less than twenty-five, and probably to more than fifty, million of dollars a year during the last two years.

In the presence of these evils, which were then only partially realized, the Congress of the United States passed the tenure-of-office act, as a barrier to their further progress. This act thus far has proved ineffectual as a complete remedy; and now the President, by his answer to the articles of impeachment, asserts his right to violate it altogether, and by an interpretation of the Constitution which is alike hostile to its letter and to the peace and welfare of the country, he assumes to himself absolute and unqualified power over all the offices and officers of the country. The removal of Mr. Stanton, contrary to the Constitution and the laws, is the particular crime of the President for which we now demand his conviction. The extent, the evil character, and the dangerous nature of the claims by which he seeks to justify his conduct, are controlling considerations. By his conviction you purify the government and restore it to its original character. By his acquittal you surrender the government into the hands of an usurping and unscrupulous man, who will use all the vast power he now claims for the corruption of every branch of the public service and the final overthrow of the public liberties.

Nor is it any excuse for the President that he has, as stated in his answer taken the advice of his cabinet officers in support of his claim. In the first place, he had no right under the Constitution to the advice of the head of a department, except upon subjects relating to the duties of his department. If the President has chosen to seek the advice of his cabinet upon other matters, and they have seen fit to give

Digitized by Google

it upon subjects not relating to their respective departments, it is advice which he had no constitutional authority to ask—advice which they were not bound to give, and that advice is to him, and for all the purposes of this investigation and trial, as the advice of private persons merely. But of what value can be the advice of men who, in the first instance, admit that they hold their offices by the will of the person who seeks their advice, and who understand most clearly that if the advice they give should be contrary to the wishes of their master, they would be at once, and in conformity with their own theory of the rights of the President, deprived of the offices which they hold? Having first made these men entirely dependent upon his will, he then solicits their advice as to the application of the principle by which they admit that they hold their places to all the other officers of the government. Could it have been expected that they, under such circumstances, would have given advice in any particular disagreeble to the will of him who sought it?

It was the advice of serfs to their lord, of servants to their master, of slaves to their owner.

The cabinet respond to Mr. Johnson as old Pollonius to Hamlet:

Hamlet says: Do you see yonder cloud that's almost in shape of a camel?
Pollonius. And by the mass, and 'tis like a camel, indeed.
Hamlet. Methinks it is like a weasel.
Pollonius. It is backed like a weasel.
Hamlet. Or like a whale?
Pollonius. Very like a whale.

The gentlemen of the cabinet understood the position that they occupied. The President, in his message to the Senate upon the suspension of Mr. Stanton, in which he says that he took the advice of his cabinet in reference to his action upon the bill regulating the tenure of certain civil offices, speaks thus:

The bill had then not become a law. The limitation upon the power of removal was not yet imposed, and there was yet time to make any changes. If any one of these gentlemen had then said to me that he would avail himself of the provisions of that bill in case it became a law, I should not have hesitated a moment as to his removal.

Having indulged his cabinet in such freedom of opinion when he consulted them in reference to the constitutionality of the bill, and having covered himself and them with public odium by its announcement, he now vaunts their opinions, extorted by power and given in subserviency, that the law itself may be violated with impunity. This, says the President, is the exercise of my constitutional right to the opinion of my cabinet. I, says the President, am responsible for my cabinet. Yes, the President is responsible for the opinions and conduct of men who give such advice as is demanded, and give it in fear and trembling lest they be at once deprived of their places. This is the President's idea of a cabinet, but it is an idea not in harmony with the theory of the Constitution.

The President is a man of strong will, of violent passions, of unlimited ambition, with capacity to employ and use timid men, adhesive men, subservient men, and corrupt men, as the instruments of his designs. It is the truth of history that he has injured every person with whom he has had confidential relations, and many have escaped ruin only by withdrawing from his society altogether. He has one rule of life: he attempts to use every man of power, capacity, or influence within his reach. Succeeding in his attempts, they are in time, and usually in a short time, utterly ruined. If the considerate flee from him, if the brave and patriotic resist his schemes or expose his plans, he attacks them with all the enginery and patronage of his office, and pursues them with all the violence of his personal hatred. He attacks to destroy all who will not become his instruments, and all who become his instruments are destroyed in the use. He spares no one. Already this purpose of his life is illustrated in the treatment of a gentleman who was of counsel for the respondent, but who has never appeared in his behalf.

The thanks of the country are due to those distinguished soldiers who, tempted

Digitized by Google

by the President by offers of kingdoms which were not his to give, refused to fall down and worship the tempter. And the thanks of the country are not less due to General Emory, who, when brought into the presence of the President by a request which he could not disobey, at once sought to protect himself against his machinations by presenting to him the law upon the subject of military orders.

The experience and the fate of Mr. Johnson's eminent adherents are lessons of warning to the country and to mankind; and the more eminent and distinguished of his adherents have furnished the most melancholy lessons for this and for succeeding generations.

It is not that men are ruined when they abandon a party; but in periods of national trial and peril the people will not tolerate those who, in any degree or under any circumstances, falter in their devotion to the rights and interests of the republic. In the public judgment, which is seldom erroneous in regard to public duty, devotion to the country, and adherence to Mr. Johnson are and have been wholly inconsistent.

Carpenter's historical painting of Emancipation is a fit reprentation of an event the most illustrious of any in the annals of America since the adoption of the Constitution. Indeed, it is second to the ratification of the Constitution, only in the fact that that instrument, as a means of organizing and preserving the nation, rendered emancipation possible. The principal figure of the scene is the immortal Lincoln, whose great virtues endear his name and memory to all mankind, and whose untimely and violent death, then the saddest event in our national experience, but now not deemed so great a calamity to the people who loved him and mourned for him as no public man was ever before loved or lamented, as is the shame, humiliation, disgrace, and suffering, caused by the misconduct and crimes of his successor. It was natural and necessary that the artist should arrange the personages of the group on the right hand and on the left of the principal figure. Whether the particular assignment was by chance, by the taste of the artist, or by the influence of a mysterious Providence which works through human agency, we know not. But on the right of Lincoln are two statesmen and patriots who, in all the trials and vicissitudes of these eventful years, have remained steadfast to liberty, to justice, to the principles of constitutional government. Senators and Mr. Chief Justice, in this presence I venture not to pronounce their names.

On the left of Lincoln are five figures representing the other members of his cabinet. One of these is no longer among the living; he died before the evil days came, and we may indulge the hope that he would have escaped the fate of his associates. Of the other four, three have been active in counselling and supporting the President in his attempts to subvert the government. They are already ruined men. Upon the canvass they are elevated to the summit of virtuous ambition. Yielding to the seductions of power they have fallen. Their example and fate may warn us, but their advice and counsel, whether given to this tribunal or to him who is on trial before this tribunal, cannot be accepted as the judgment of wise or of patriotic men.

On motion of Mr. Sprague, at 2 o'clock and 15 minutes p. m. the Senate took a recess for 15 minutes.

At the expiration of the recess the Chief Justice resumed the chair and called the Senate to order.

Mr. SHERMAN. I move that the roll of the senators be called, so that we may get their attendance.

Mr. CONNESS. That is never done.

Mr. SHERMAN. It can be done. A motion to adjourn will have the same effect practically.

Mr. CONNESS. The senator may move an adjournment, and get a call in that way.

Digitized by Google

Mr. SHERMAN. I move a call of the senators.

The CHIEF JUSTICE. The senator from Ohio moves that the roll of the Senate be called.

Mr. CONNESS. It never has been done.

Mr. SUMNER. The rule provides for a call of the Senate.

Mr. CONNESS. I should like to hear the rule.

Mr. SUMNER. It is Rule 16.

The CHIEF JUSTICE. The Secretary will read the sixteenth rule of the Senate.

The chief clerk read as follows:

16. When the yeas and nays shall be called for by one-fifth of the senators present, each senator called upon shall, unless for special reasons he be excused by the Senate, declare openly and without debate his assent or dissent to the question. In taking the yeas and nays, and upon a call of the Senate, the names of the senators shall be called alphabetically.

The CHIEF JUSTICE. If there be no objection, the Secretary will call the roll, to ascertain who are present.

Mr. DRAKE. I object, sir.

Mr. SHERMAN. I move that there be a call of the Senate.

The motion was agreed to; and the roll being called, 44 senators answered to their names.

The CHIEF JUSTICE. There are 44 senators answering to their names. The honorable manager will proceed.

Mr. Manager BOUTWELL. Mr. President, senators, leaving the discussion of the provisions of the Constitution, I am now prepared to ask your attention to the character and history of the act of 1789, on which stress has been laid by the President in his answer, and by the learned counsel who opened the case for the respondent. The discussion in the House of Representatives in 1789 related to the bill establishing a department of foreign affairs. The first section of that bill, as it originally passed the House of Representatives, after recapitulating the title of the officer who was to take charge of the department, and setting forth his duties, contained these words in reference to the Secretary of the department: "To be removable from office by the President of the United States." The House, in Committee of the Whole, discussed this provision during several days, and all the leading members of the body appear to have taken part in the debate. As is well known, there was a difference of opinion at the time as to the meaning of the Constitution. Some contended that the power of removing civil officers was vested in the President, absolutely, to be exercised by him, without consultation with the Senate, and this as well when the Senate was in session as during vacations. Others maintained that the initiative in the removal of a public officer must be taken by the President, but that there could be no actual removal except by the advice and consent of the Senate, and that this rule was applicable to the powers of the President, as well during the vacation as during the session of the Senate. Others maintained that during the session of the Senate, while the initiative was in the President, the actual removal of a civil officer could be effected only upon the advice and consent of the Senate, but that during the vacations the President might remove such officers and fill their places temporarily, under commissions, to expire at the end of the next session of the Senate. Mr. Madison maintained the first of these propositions, and he may be said to be the only person of historical reputation at the present day who expressed corresponding opinions, although undoubtedly his views were sustained by a considerable number of members. It is evident from an examination of the debate that Mr. Madison's views were gradually and, finally, successfully undermined by the discussion on that occasion.

As is well known, Roger Sherman was then one of the most eminent members of that body. He was a signer of the Declaration of Independence, a member of the convention which framed the Constitution of the United States, and a member of the House of Representatives of the First Congress. He was un-

Digitized by Google

doubtedly one of the most illustrious men of the constitutional period of American history; and in each succeeding generation there have been eminent persons of his blood and name; but at no period has his family been more distinguished than at the present time. Mr. Sherman took a leading part in the discussion, and there is no doubt that the views which he entertained and expressed had a large influence in producing the result which was finally reached. The report of the debate is found in the first volume of the Annals of Congress; and I quote from the remarks made by Mr. Sherman, preserved on pages 510 and 511 of that volume:

Mr. SHERMAN. I consider this a very important subject in every point of view, and therefore worthy of full discussion. In my mind it involves three questions. First. Whether the President has, by the Constitution, the right to remove an officer appointed by and with the advice and consent of the Senate. No gentleman contends but that the advice and consent of the Senate are necessary to make the appointment in all cases, unless in inferior offices where the contrary is established by law; but then they allege that, although the consent of the Senate be necessary to the appointment, the President alone, by the nature of his office, has the power of removal. Now it appears to me that this opinion is ill-founded, because this provision was intended for some useful purpose, and by that construction would answer none at all. I think the concurrence of the Senate as necessary to appoint an officer as the nomination of the President; they are constituted as mutual checks, each having a negative upon the other.

I consider it as an established principle that the power which appoints can also remove, unless there are express exceptions made. Now the power which appoints the judges cannot displace them, because there is a constitutional restriction in their favor; otherwise the President, by and with the advice and consent of the Senate, being the power which appointed them, would be sufficient to remove them. This is the construction in England, where the King has the power of appointing judges; it was declared to be during pleasure, and they might be removed when the monarch thought proper. It is a general principle in law, as well as reason, that there shall be the same authority to remove as to establish. It is so in legislation, where the several branches, whose concurrence is necessary to pass a law, must concur in repealing it. Just so I take it to be in cases of appointment, and the President alone may remove, when he alone appoints, as in the case of inferior offices to be established by law.

* * * * * * *

As the office is the mere creature of the legislature we may form it under such regulations as we please, with such powers and duration as we think good policy requires. We may say he shall hold his office during good behavior, or that he shall be annually elected. We may say he shall be displaced for neglect of duty, and point out how he shall be convicted of it without calling upon the President or Senate.

The third question is, if the legislature has the power to authorize the President alone to remove this officer, whether it is expedient to invest him with it? I do not believe it absolutely necessary that he should have such power, because the power of suspending would answer all the purposes which gentlemen have in view by giving the power of removal. I do not think that the officer is only to be removed by impeachment, as is argued by the gentleman from South Carolina, (Mr. Smith,) because he is the mere creature of the law, and we can direct him to be removed on conviction of mismanagement or inability, without calling upon the Senate for their concurrence. But I believe, if we make no such provision, he may constitutionally be removed by the President, by and with the advice and consent of the Senate; and I believe it would be most expedient for us to say nothing in the clause on this subject.

I may be pardoned if I turn aside for a moment, and, addressing myself to the learned gentleman of counsel for the respondent who is to follow me in argument, I request him to refute, to overthrow the constitutional argument of his illustrious ancestor, Roger Sherman. Doing this he will have overcome the first, but only the first, of a series of obstacles in the path of the President.

In harmony with the views of Mr. Sherman was the opinion expressed by Mr. Jackson of Georgia, found on page 508 of the same volume. He says:

I shall agree to give him (that is the President) the same power in cases of removal that he has in appointing; but nothing more. Upon this principle, I would agree to give him the power of suspension during the recess of the Senate. This, in my opinion, would effectually provide against those inconveniences which have been apprehended, and not expose the government to those abuses we have to dread from the wanton and uncontrollable authority of removing officers at pleasure.

It may be well to observe that Mr. Madison, in maintaining the absolute power of the President to remove civil officers, coupled with his opinions upon

that point doctrines concerning the power of impeachment which would be wholly unacceptable to this respondent. And, indeed, it is perfectly apparent that without the existence of the power to impeach and remove the President of the United States from office, in the manner maintained by Mr. Madison, in that debate, that the concession of absolute power of removal would end in the destruction of the government. Mr. Madison, in that debate, said:

> The danger to liberty, the danger of maladministration has not yet been found to lie so much in the facility of introducing improper persons into office as in the difficulty of displacing those who are unworthy of the public trust. (Page 515, vol. 1, Annals of Congress.)

Again he says:

> Perhaps the great danger, as has been observed, of abuse in the executive power lies in the improper continuance of bad men in office. But the power we contend for will not enable him to do this; for if an unworthy man be continued in office by an unworthy President, the House of Representatives can at any time impeach him, and the Senate can remove him, whether the President chooses or not. The danger, then, consists merely in this: the President can displace from office a man whose merits require that he should be continued in it. What will be the motives which the President can feel for such abuse of his power and the restraints that operate to prevent it? In the first place, he will be impeachable by this house before the Senate for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his high trust. (Page 517, vol. 1, Annals of Congress.)

It is thus seen that Mr. Madison took great care to connect his opinions of the power of removal in the President with a distinct declaration that if this power was improperly exercised by the President he would himself be liable to impeachment and removal from office. If Mr. Madison's opinions were to be accepted by the President as a whole, he would be as defenceless as he is at the present time if arraigned upon articles of impeachment based upon acts of maladministration in the removal of public officers. The result of the debate upon the bill for establishing the executive department of foreign affairs was that the phrase in question which made the head of the department "removable from office by the President of the United States," was stricken out by a vote of 31 in the affirmative to 19 in the negative, and another form of expression was introduced into the second section, which is manifestly in harmony with the views expressed by Mr. Sherman, and those who entertained corresponding opinions.

The second section is in these words:

> SEC. 2. *And be it further enacted*, That there shall be in the said department an inferior officer, to be appointed by the said principal officer, and to be employed therein as he shall deem proper, and to be called the chief clerk of the department of foreign affairs, and who, whenever the said principal officer shall be removed from office by the President of the United States, or in other case of vacancy, shall, during such vacancy, have the charge and custody of all records, books, and papers appertaining to said department.

(United States Statutes at Large, vol. 1, p. 29.)

It will be seen that the phrase here employed, "whenever the said principal officer shall be removed from office by the President of the United States," is not a grant of power to the President; nor is it, as was asserted by the counsel for the respondent, a legislative interpretation of a constitutional power. But it is merely a recognition of a power in the Constitution to be exercised by the President, at some time, under some circumstances, and subject to certain limitations. But there is no statement or declaration of the time when such power could be exercised, the circumstances under which it might be exercised, or the limitations imposed upon its exercise.

All these matters are left subject to the operation of the Constitution and to future legislation. This is in entire harmony with the declaration made by Mr. White, of North Carolina, in the debate of 1789. He says:

> Let us then leave the Constitution to a free operation, and let the President, with or without the consent of the Senate, carry it into execution. Then, if any one supposes himself injured by their determination let him have recourse to the law, and its decision will establish the true construction of the Constitution.

Mr. Gerry, of Massachusetts, also said:

Hence all construction of the meaning of the Constitution is dangerous or unnatural, and therefore ought to be avoided. This is our doctrine, that no power of this kind ought to be exercised by the legislature. But we say, if we must give a construction to the Constitution it is more natural to give the construction in favor of the power of removal vesting in the President, by and with the advice and consent of the Senate; because it is in the nature of things that the power which appoints removes also.

Again, Mr. Sherman said speaking of the words which were introduced into the first section and finally stricken out:

I wish, Mr. Chairman, that the words may be left out of the bill, without giving up the question either way as to the propriety of the measure.

The debate upon the bill relating to the department for foreign affairs occurred in the month of June, 1789; in the following month of August Congress was engaged in considering the bill establishing the Treasury Department. This bill originated in the House, and contained the phrase now found in it, being the same as that contained in the bill establishing the State Department.

The Senate was so far satisfied of the impolicy of making any declaration whatever upon the subject of removal, that the clause was struck out by an amendment. The House refused to concur, however, and the Senate, by the casting vote of the Vice-President, receded from the amendment.

All this shows that the doctrine of the right of removal by the President survived the debate only as a limited and doubtful right at most.

The results reached by the Congress of 1789 are conclusive upon the following points: that that body was of opinion that the power of removal was not in the President absolutely, to be exercised at all times and under all circumstances; and secondly, that during the sessions of the Senate the power of removal was vested in the President and Senate, to be exercised by their concurrent action; while the debate and the votes indicate that the power of the President to remove from office during the vacation of the Senate, was, at best, a doubtful power under the Constitution.

It becomes us next to consider the practice of the government, under the Constitution, and in the presence of the action of the first Congress, by virtue of which the President now claims an absolute, unqualified, irresponsible power over all public officers, and this without the advice and consent of the Senate, or the concurrence of any other branch of the government. In the early years of the government the removal of a public officer by the President was a rare occurrence, and it was usually resorted to during the session of the Senate, for misconduct in office only, and accomplished by the appointment of a successor through the advice and consent of the Senate. Gradually a practice was introduced, largely through the example of Mr. Jefferson, of removing officers during the recess of the Senate and filling their places under commissions to expire at the end of the next session. But it cannot be said that this practice became common until the election of General Jackson, in 1828. During his administration the practice of removing officers during the recesses of the Senate was largely increased, and in the year 1832, on the 18th of September, General Jackson removed Mr. Duane from the office of Secretary of the Treasury. This occurred, however, during a recess of the Senate. This act on his part gave rise to a heated debate in Congress, and an ardent controversy throughout the country, many of the most eminent men contending that there was no power in the President to remove a civil officer, even during the recess of the Senate. The triumph of General Jckson in that controversy gave a full interpretation to the words which had been employed in the statute of 1789.

But, at the same time, the limitations of that power in the President were clearly settled, both upon the law and upon the Constitution, that whatever might be his power of removal during a recess of the Senate, he had no right to make a removal during a session of the Senate, except upon the advice and

consent of that body to the appointment of a successor. This was the opinion of Mr. Johnson himself, as stated by him in a speech made in the Senate on the 10th of January, 1861:

I meant that the true way to fight the battle was for us to remain here and occupy the places assigned to us by the Constitution of the country. Why did I make that statement? It was because on the 4th day of March next we shall have six majority in this body; and if, as some apprehended, the incoming administration shall show any disposition to make encroachments upon the institution of slavery, encroachments upon the rights of the States or any other violation of the Constitution, we, by remaining in the Union and standing at our places, will have the power to resist all these encroachments. How? We have the power even to reject the appointment of the Cabinet officers of the incoming President. Then, should we not be fighting the battle in the Union by resisting even the organization of the administration in a constitutional mode, and thus, at the very start, disable an administration which was likely to encroach on our rights and to violate the Constitution of the country? So far as appointing even a minister abroad is concerned the incoming administration will have no power without our consent, if we remain here. It comes into office handcuffed, powerless to do harm. We, standing here, hold the balance of power in our hands; we can resist it at the very threshold effectually, and do it inside of the Union and in our house. The incoming administration has not even the power to appoint a postmaster, whose salary exceeds $1,000 a year, without consultation with, and the acquiescence of, the Senate of the United States. The President has not even the power to draw his salary, his $25,000 per annum, unless we appropriate it. (Congressional Globe, vol. 43, page 309.

It may be well observed, that for the purposes of this trial, and upon the question whether the President is or is not guilty under the first three articles exhibited against him by the House of Representatives, it is of no consequence whether the President of the United States has power to remove a civil officer during a recess of the Senate. The fact charged and proved against the President, and on which, as one fact proved against him, we demand his conviction, is, that he attempted to remove Mr. Stanton from the office of Secretary of War during a session of the Senate. It cannot be claimed with any propriety that the act of 1789 can be construed as a grant of power to the President to an extent beyond the practice of the government for three-quarters of a century under the Constitution, and under the provisions of the law of 1789. None of the predecessors of Mr. Johnson, from General Washington to Mr. Lincoln, although the act of 1789 was in existence during all that period, had ever ventured to claim that either under that act, or by virtue of the Constitution, the President of the United States had power to remove a civil officer during a session of the Senate, without its consent and advice. The utmost that can be said is, that for the last forty years it had been the practice of the Executive to remove civil officers at pleasure during the recess of the Senate. While it may be urged that this practice, in the absence of any direct legislation upon the subject, had become the common law of the country, protecting the Executive in a policy corresponding to that practice, it is also true, for stronger reasons, that Mr. Johnson was bound by his oath of office to adhere to the practice of his predecessors in other particulars, none of whom had ever ventured to remove a civil officer from his office during the session of the Senate and appoint a successor, either permanent or *ad interim*, and authorize that successor to enter upon the discharge of the duties of such office. The case of Timothy explained, and it constitutes no exception. As far as is known to me the lists of removals and appointments introduced by the respondent do not sustain the claim of the answer in regard to the power of removal.

Hence it is that the act of 1789 is no security to this respondent, and hence it is that we hold him guilty of a violation of the Constitution and of his oath of office, under the first and third articles of impeachment, exhibited against him by the House of Representatives, and this without availing ourselves of the provisions of the tenure-of-office act of March 2, 1867.

I respectfully ask that the views now submitted in reference to the act of 1789, may be considered in connection with the argument I have already offered,

Digitized by Google

upon the true meaning of the provisions of the Constitution relating to the appointment of civil officers.

I pass now to the consideration of the act of the 13th of February, 1795, on which the President relies as a justification for his appointment of Lorenzo Thomas as Secretary of War *ad interim*. By this act it is provided:

> In case of vacancy in the office of Secretary of State, the Secretary of the Treasury, or of the Secretary of the Department of War, or of any other officer of either of the said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorise any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed or such vacancy be filled: *Provided*, That no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months. (1 Stat. at Large, p. 415.)

The ingenuity of the the President and his counsel has led them to maintain that the phrase "in case of vacancy," used in this statute, relates to any and every vacancy, however produced. But the reading of the entire section, whether casually or carefully, shows that the purpose of the law was to provide a substitute temporarily in case of vacancy, whereby the person in office *could not perform the duties of his office*, and necessarily applied only to those contingencies of official life which put it out of the power of the person in office to discharge the duties of the place; such as sickness, absence or inability of any sort. And yet the President and his counsel contend that a removal by the President is a case of vacancy contemplated by the law, notwithstanding the limitation of the President in his power of appointing an officer temporarily, is to those cases which render it impossible for the duly commissioned officer to perform the duties of his office. When it is considered, as I have shown, that the President had no power—and this without considering the tenure-of-office act of March 2, 1867—to create a vacancy during a session of the Senate, the act of 1795, even upon his construction, furnishes no defence whatever. But we submit that if he had possessed the power which he claims by virtue of the act of 1789, that the vacancy referred to in the act of 1795 is not such a vacancy as is caused by the removal of a public officer, but that that act is limited to those vacancies which arise unavoidably in the public service, and without the agency of the President. But there is in the section of the act of 1795, on which the President relies, a proviso which nullifies absolutely the defence which he has set up. This proviso is, that no one vacancy shall be supplied in manner aforesaid (that is, by a temporary appointment) for a longer term than six months. Mr. Johnson maintains that he suspended Mr. Stanton from the office of Secretary of War on the 12th of August last, not by virtue of the tenure-of-office act of March 2, 1867, but under a power incident to the general and unlimited power of removal, which, as he claims, is vested in the President of the United States, and that, from the 12th of August last, Mr. Stanton has not been entitled to the office of Secretary for the Department of War. If he suspended Mr. Stanton as an incident of his general power of removal, then his suspension, upon the President's theory, created a vacancy such as is claimed by the President under the statute of 1795. The suspension of Mr. Stanton put him in such a condition that he "could not perform the duties of the office." The President claims also to have appointed General Grant Secretary of War *ad interim* on the 12th of August last, by virtue of the statute of 1795. The proviso of that statute declares that no one vacancy shall be supplied in manner aforesaid (that is, by temporary appointment) for a longer term than six months. If the act of 1795 were in force, and if the President's theory of his rights under the Constitution and under that act were a valid theory, the six months during which the vacancy might have been supplied temporarily expired by limitation on the 12th day of February, 1868, and yet on the 21st day of February, 1868, the President appointed Lorenzo Thomas Secretary of War *ad*

Digitized by Google

interim to the same vacancy, and this in violation of the statute which he pleads in his own defence. It is too clear for argument that if Mr. Stanton was lawfully suspended, as the President now claims, but not suspended under the tenure-of-office act, then the so-called restoration of Mr. Stanton on the 13th January was wholly illegal. But if the statute of 1795 is applicable to a vacancy created by suspension or removal, then the President has violated it by the appointment of General Thomas Secretary of War *ad interim*. And if the statute of 1795 is not applicable to a vacancy occasioned by a removal, then the appointment of General Thomas Secretary of War *ad interim* is without authority or the color of authority of law.

The fact is, however, that the statute of 1795 is repealed by the operation of the statute of the 20th of February, 1863. (Stat. at Large, vol. 12, p. 656.)

If senators will consider the provisions of the statute of 1863 in connection with the power of removal under the Constitution during a session of the Senate, by and with the advice and consent of the Senate, and the then recognized power of removal by the President during a recess of the Senate to be filled by temporary appointments, as was the practice previous to March 2, 1867, they will find that provision was made by the act of 1863 for every vacancy which could possibly arise in the public service.

The act of February 20, 1863, provides—

That in case of the death, *resignation*, absence from the seat of government, or sickness of the head of an executive department of the government, or of any officer of either of the said departments whose appointment is not in the head thereof, *whereby they cannot perform the duties of their respective offices*, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize the head of any other executive department or other officer in either of said departments whose appointment is vested in the President, at his discretion to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability shall cease: *Provided*, That no one vacancy shall be supplied in manner aforesaid for a longer term than six months.

Provision was thus made by the act of 1863 for filling all vacancies which could occur under any circumstances. It is a necessary rule of construction that all previous statutes making other and different provisions for the filling of vacancies are repealed by the operation of more recent statutes; and for the plain reason that it is inconsistent with any theory of government that there should be two legal modes in existence at the same time for doing the same thing.

If the view I have presented be a sound one, it is apparent that the President's conduct finds no support either in the Constitution, in the act of 1789, or in the legislation of 1795, on which he chiefly relies as a justification for the appointment of Thomas as Secretary of War *ad interim*. It follows, also, that if the tenure-of-office act had not been passed the President would have been guilty of a high misdemeanor, in that he issued an order for the removal of Mr. Stanton from office during the session of the Senate, in violation of the Constitution and of his own oath of office; that he was guilty of a high misdemeanor in the appointment of Lorenzo Thomas as Secretary of War *ad interim*, and this whether the act of the 13th of February, 1795, is in force, or whether the same has been repealed by the statute of 1863. His guilt is thus fully proved and established as charged in the first, second and third articles of impeachment exhibited against him by the House of Representatives, and this without considering the requirements or constitutionality of the act regulating the tenure of certain civil offices.

I pass now to the consideration of the tenure-of-office act. I preface what I have to say, by calling to your attention that portion of my argument already addressed to you, in which I have set forth and maintained, as I was able, the opinion that the President had no right to make any inquiry whether an act of Congress is or is not constitutional. That, having no right to make such inquiry, he could not plead that he had so inquired, and reached the conclusion that the act inquired about was invalid. You will also bear in mind the views presented,

that this tribunal can take no notice of any argument or suggestion that a law deemed unconstitutional may be wilfully violated by the President. The gist of his crime is, that he intentionally disregarded a law, and, in the nature of the case, it can be no excuse or defence that such law, in his opinion, or in the opinion of others, was not in conformity with the Constitution.

In this connection, I desire to call your attention to suggestions made by the President, and by the President's counsel—by the President in his message of December, 1867, and by the President's counsel in his opening argument—that if Congress were by legislation to abolish a department of the government, or to declare that the President should not be Commander-in-chief of the army or the navy, that it would be the duty of the President to disregard such legislation. These are extreme cases, and not within the range of possibility. Members of Congress are individually bound by an oath to support the Constitution of the United States, and it is not to be presumed, even for the purpose of argument, that they would wantonly disregard the obligations of their oath, and enact in the form of law rules or proceedings in plain violation of the Constitution. Such is not the course of legislation, and such is not the character of the act we are now to consider. The bill regulating the tenure of certain civil offices was passed by a constitutional majority in each of the two houses, and it is to be presumed that each senator and representative who gave it his support did so in the belief that its provisions were in harmony with the provisions of the Constitution. We are now dealing with practical affairs, and conducting the government within the Constitution; and in reference to measures passed by Congress under such circumstances, it is wholly indefensible for the President to suggest the course that in his opinion he would be justified in pursuing if Congress were openly and wantonly to disregard the Constitution, and inaugurate revolution in the government.

It is asserted by the counsel for the President that he took advice as to the constitutionality of the tenure-of-office act, and being of opinion that it was unconstitutional, or so much of it at least as attempted to deprive him of the power of removing the members of the cabinet, he felt it to be his duty to disregard its provisions; and the question is now put with feeling and emphasis whether the President is to be impeached, convicted, and removed from office for a mere difference of opinion. True, the President is not to be removed for a *mere* difference of opinion. If he had contented himself with the opinion that the law was unconstitutional, or even with the expression of such an opinion privately or officially to Congress, no exception could have been taken to his conduct. But he has attempted to act in accordance with that opinion, and in that action, he has disregarded the requirements of the statute. It is for this action that he is to be arraigned, and is to be convicted. But it is not necessary for us to rest upon the doctrine that it was the duty of the President to accept the law as constitutional and govern himself accordingly in all his official doings. We are prepared to show that the law is in truth in harmony with the Constitution, and that its provisions apply to Mr. Stanton as Secretary for the Department of War.

The tenure-of-office act makes no change in the powers of the President and the Senate, during the session of the Senate, to remove a civil officer upon a nomination by the President, and confirmation by the Senate, of a successor. This was an admitted constitutional power from the very organization of the government, while the right now claimed by the President to remove a civil officer during a session of the Senate, without the advice and consent of the Senate, was never asserted by any of his predecessors, and certainly never recognized by any law or by any practice. This rule applied to heads of departments as well as to other civil officers. Indeed, it may be said, once for all, that the tenure by which members of the cabinet have held their places corresponds in every particular to the tenure by which other civil officers have

held theirs. It is undoubtedly true that, in practice, members of the cabinet have been accustomed to tender their resignations upon a suggestion from the President that such a course would be acceptable to him. But this practice has never changed their legal relations to the President or to the country. There was never a moment of time, since the adoption of the Constitution, when the law or the opinion of the Senate recognized the right of the President to remove a cabinet officer during a session of the Senate, without the consent of the Senate given through the confirmation of a successor. Hence, in this particular the tenure-of-office act merely enacted and gave form to a practice existing from the foundation of the government—a practice in entire harmony with the provisions of the Constitution upon that subject. The chief change produced by the tenure-of-office act had reference to removals during the recess of the Senate. Previous to the 2d of March, 1867, as has been already shown, it was the practice of the President during the recesses of the Senate to remove civil officers and to grant commissions to other persons, under the third clause of the second section of the second article of the Constitution. This power, as has been seen, was a doubtful one in the beginning. The practice grew up under the act of 1789, but the right of Congress by legislation to regulate the exercise of that power was not questioned in the great debate of that year, nor can it reasonably be drawn into controversy now.

The act of March 2d, 1867, declares that the President shall not exercise the power of removal, absolutely, during the recess of the Senate, but that if any officer shall be shown, by evidence satisfactory to the President, to be guilty of misconduct in office, or of crime, or for any reason shall become incapable or legally disqualified to perform his duties, the President may suspend him from office and designate some suitable person to perform temporarily the duties of such office until the next meeting of the Senate and the action of the Senate thereon.

By this legislation the removal is qualified and is made subject to the final action of the Senate instead of being absolute, as was the fact under the practice theretofore prevailing. It is to be observed, however, that this feature of the act regulating the tenure of certain civil offices is not drawn into controversy by these proceedings, and therefore it is entirely unimportant to the President whether that provision of the act is constitutional or not. I can, however, entertain no doubt of its constitutionality. The record of the case shows that Mr. Stanton was suspended from office during the recess, but was removed from office, as far as an order of the President could effect his removal, during a session of the Senate. It is also wholly immaterial to the present inquiry whether the suspension of Mr. Stanton on the 12th of August, 1867, was made under the tenure-of-office act, or in disregard of it, as the President now asserts. It being thus clear, that so much of the act as relates to appointments and removals from office during the session of the Senate is in harmony with the practice of the government from the first, and in harmony with the provisions of the Constitution on which that practice was based, and it being admitted that the order of the President for the removal of Mr. Stanton was issued during a session of the Senate, it is unnecessary to inquire whether the other parts of the act are constitutional or not, and also unnecessary to inquire what the provisions of the act are in reference to the heads of the several executive departments. I presume authorities are not needed to show that a law may be unconstitutional and void in some of its parts, and the remaining portions continue in full force.

The body of the first section of the act regulating the tenure of certain civil offices is in these words:

Every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is, and shall be entitled, to hold

such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided.

Omitting for the moment to notice the exception, there can be no doubt that this provision would have applied to the Secretary of War, and to every other civil officer under the government; nor can there be any doubt that the removal of Mr. Stanton during a session of the Senate is a misdemeanor by the law, and punishable as such under the sixth section of the act, unless the body of the section quoted is so controlled by the proviso as to take the Secretary of War out of its grasp. The proviso is in these words:

That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General shall hold their offices respectively for and during the term of the President by whom they may have been appointed, and one month thereafter, subject to removal by and with the advice and consent of the Senate.

We maintain that Mr. Stanton, as Secretary of War, was, on the second day of March, 1867, within and included under the language of the proviso, and was to hold his office for and during the term of the President by whom he had been appointed, and one month thereafter, subject to removal, however, by and with the advice and consent of the Senate. We maintain that Mr. Stanton was then holding the office of Secretary of War, for and in the term of President Lincoln, by whom he had been appointed; that that term commenced on the fourth of March, 1865, and will end on the fourth of March, 1869. The Constitution defines the meaning of the word "term." When speaking of the President, it says: "He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows." Now, then, although the President first elected may die during his term, the office and the term of the office still remain. Having been established by the Constitution, it is not in any degree dependent upon the circumstance whether the person elected to the term shall survive to the end or not. It still is a Presidential term. It still is in law the term of the President who was elected to the office. The Vice-President was chosen at the same time, and elected for the same term. But it is the term of a different office from that of President—the term of the office of Vice-President. Mr. Johnson was elected to the office of Vice-President for the term of four years. Mr. Lincoln was elected to the office of President for the term of four years. Mr. Lincoln died in the second month of his term, and Mr. Johnson succeeded to the office.

It was not a new office; it was not a new term. He succeeded to Mr. Lincoln's office, and for the remainder of Mr. Lincoln's term of office. He is serving out Mr. Lincoln's term as President. The law says that the Secretaries shall hold their offices respectively for and during the term of the President by whom they may have been appointed. Mr. Lincoln's term commenced on the 4th of March, 1865. Mr. Stanton was appointed by Mr. Lincoln; he was in office in Mr. Lincoln's term, when the act regulating the tenure of certain civil officers was passed; and by the proviso of that act he was entitled to hold that office until one month after the 4th of March, 1869, unless he should be sooner removed therefrom, by and with the advice and consent of the Senate.

The act of March 1, 1792, concerning the succession, in case the office of President and Vice-President both become vacant, recognizes the presidential term of four years as the constitutional term. Any one can understand that in case of vacancy in the office of President and Vice-President, and in case of a new election by the people, that it would be desirable to make the election for the remainder of the term. But the act of 1792 recognizes the impossibility of this course in the section which provides that the term of four years for which a President and Vice-President shall be elected (that is, in case of a new election, as stated) shall in all cases commence on the fourth day of March next succeeding the day on which the votes of the electors shall have been given.

It is thus seen that by an election to fill a vacancy, the government would be

so far changed in its practical working that the subsequent elections of President, except by an amendment to the Constitution, could never again occur in the years divisible by four, as at present, and might not answer to the election of members of the House of Representatives, for the presidential elections might occur in the years not divisible by two. The Congress of 1792 acted upon the constitutional doctrine that the presidential term is four years and cannot be changed by law.

On the 21st of February, 1868, while the Senate of the United States was in session, Mr. Johnson, in violation of the law—which, as we have already seen, is in strict harmony in this particular with the Constitution and with the practice of every administration under the Constitution from the beginning of the government—issued an order for the removal of Mr. Stanton from his office as Secretary for the Department of War. If, however, it be claimed that the proviso does not apply to the Secretary of War, then he does not come within the only exception made in the statute to the general provision in the body of the first section already quoted; and Mr. Stanton having been appointed to office originally by and with the advice and consent of the Senate, could only be removed by the nomination and appointment of a successor, by and with the advice and consent of the Senate. Hence, upon either theory it is plain that the President violated the tenure-of-office act in the order which he issued on the 21st day of February, A. D. 1868, for the removal of Mr. Stanton from the office of Secretary for the Department of War, the Senate of the United States being then in session.

In support of the view I have presented, I refer to the official record of the amendments made to the first section of the tenure-of-office act. On the 18th of January, 1867, the bill passed the Senate, and the first section thereof was in these words:

> That every person [excepting the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General] holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided.

On the second day of February the House passed the bill with an amendment striking out the words included in brackets. This action shows that it was the purpose of the House to include heads of departments in the body of the bill, and subject them to its provisions as civil officers who were to hold their places by and with the advice and consent of the Senate, and subject, during the session of the Senate, to removal by and with the advice and consent of the Senate only; but subject to suspension under the second section during a recess of the Senate as other civil officers, by virtue of the words at the close of the section, "except as herein otherwise provided." At the time the bill was pending between the two houses there was no proviso to the first section, and the phrase "except as otherwise herein provided," related necessarily to the second and to the subsequent sections of the bill. On the 6th of February the Senate refused to agree to the House amendment, and by the action of the two houses the bill was referred to a committee of conference. The conference committee agreed to strike out the words in brackets agreeably to a vote of the House, but as a recognition of the opinion of the Senate the proviso was inserted which modified in substance the effect of the words stricken out, under the lead of the House, only in this, that the cabinet officers referred to in the body of the section as it passed the House were to hold their offices as they would have held them if the House amendment had been agreed to without condition, with this exception, that they were to retire from their offices in one month after the end of the term of the President by whom they might have been appointed to office. The object and effect of this qualification of the provision for which the House con-

Digitized by Google

tended, was to avoid fastening, by operation of law, upon an incoming President the cabinet of his predecessor, with no means of relieving himself from them unless the Senate of the United States was disposed to concur in their removal.

In short, they were to retire by operation of law, at the end of one month after the expiration of the term of the President by whom they had been appointed, and in this particular their tenure of office was distinguished by the proviso, from the tenure by which other civil officers mentioned in the body of the section were to hold their offices, and their tenure of office is distinguished in no other particular.

The counsel who opened the cause for the President was pleased to read from the Globe the remarks made by Mr. Schenck, in the House of Representatives, when the report of the conference committee was under discussion. But he read only a portion of the remarks of that gentleman, and connected with them observations of his own, by which he may have led the Senate into the error that Mr. Schenck entertained the opinion as to the effect of the proviso which is now urged by the respondent; but so far from this being the case, the statement made by Mr. Schenck to the House is exactly in accordance with the doctrine now maintained by the managers on the part of the House of Representatives. After Mr. Schenck had made the remarks quoted by the counsel for the respondent, Mr. Le Blond, of Ohio, rose and said:

I would like to inquire of the gentleman who has charge of this report whether it becomes necessary that the Senate shall concur in all appointments of executive officers, and that none of them can be removed after appointment without the concurrence of the Senate?

Mr. Schenck says, in reply:

That is the case; but their terms of office are limited, (as they are not now limited by law,) so that they expire with the term of service of the President who appoints them, and one month after, in case of death or other accident, until others can be substituted for them by the incoming President.

Mr. Le Blond, continuing, said:

I understand, then, this to be the effect of the report of the committee of conference: In the event of the President finding himself with a cabinet officer who does not agree with him, and whom he desires to remove, he cannot do so, and have a cabinet in keeping with his own views, unless the Senate shall concur.

To this Mr. Schenck replies:

The gentleman certainly does not need that information from me, as this subject has been fully debated in this House.

Mr. Le Blond said, finally:

Then I hope the House will not agree to the report of the committee of conference.

This debate in the House shows that there was there and then no difference of opinion between Mr. Schenck, who represented the friends of the bill, and Mr. Le Blond, who represented the opponents of the bill, that its effect was to confirm the Secretaries who were then in office, in their places, until one month after the expiration of Mr. Lincoln's term of office, to wit, the fourth day of March, 1869, unless, upon the nomination of successors, they should be removed by and with the advice and consent of the Senate. Nor does the language used by the honorable senator from Ohio, who reported the result of the conference to the Senate, justify the inference which has been drawn from it by the counsel for the respondent. The charge made by the honorable senator from Wisconsin, which the honorable senator from Ohio was refuting, seems to have been, in substance, that the first section of the bill and the proviso to the first section of the bill had been framed with special reference to Mr. Johnson as President, and to the existing condition of affairs. In response to this, the honorable senator from Ohio said:

I say that the Senate have not legislated with a view to any persons or any President, and therefore he commences by asserting what is not true. We do not legislate in order to keep in the Secretary of War, the Secretary of the Navy, or the Secretary of State.

Digitized by Google

It will be observed that this language does not indicate the opinion of the honorable senator as to the effect of the bill; but it is only a declaration that the object of the legislation was not that which had been intimated or alleged by the honorable senator from Wisconsin. This view of the remarks of the honorable senator from Ohio is confirmed by what he afterwards said in reply to the suggestion that members of the cabinet would hold their places against the wishes of the President, when he declares that under such circumstances he, as a senator, would consent to their removal at any time, showing most clearly that he did not entertain the idea that under the tenure-of-office act it would be in the power of the President to remove a cabinet officer without the advice and consent of the Senate. And we all agree that in ordinary times, and under ordinary circumstances, it would not only be just and proper for a cabinet officer to tender his resignation at once, upon the suggestion of the President that it would be acceptable, but we also agree that it would be the height of personal and official indecorum if he were to hesitate for a moment as to his duty in that particular. But the justification of Mr. Stanton, and his claim to the gratitude and the encomiums of his countrymen, is, that when the nation was imperilled by the usurpations of a criminally-minded chief magistrate, he asserted his constitutional and legal rights to the office of Secretary for the Department of War, and thus by his devotion to principle, and at great personal sacrifices, he has done more than any other man since the close of the rebellion to protect the interests and maintain the rights of the people of the country.

But the strength of the view we entertain of the meaning and scope of the tenure-of-office act, is nowhere more satisfactorily demonstrated than in the inconsistencies of the argument which has been presented by the learned counsel for the respondent in support of the President's positions. He says, speaking of the first section of the act regulating the tenure of certain civil offices, "Here is a section, then, the body of which applies to all civil officers, as well to those then in office, as to those who should thereafter be appointed. The body of this section contains a declaration that every such officer 'is,' that is, if he is now in office, and 'shall be,' that is, if he shall hereafter be appointed to office, entitled to hold until a successor is appointed and qualified in his place. That is the body of the section." This language of the eminent counsel is not only an admission, but it is a declaration that the Secretary for the Department of War, being a civil officer, as is elsewhere admitted in the argument of the counsel for the respondent is included in and covered and controlled by the language of the body of this section. It is a further admission that in the absence of the proviso, the power of the President over the Secretary for the Department of War would correspond exactly to his power over any other civil officer, which would be merely the power to nominate a successor whose confirmation by the Senate, and appointment, would work the removal of the person in office. When the counsel for the respondent, proceeding in his argument, enters upon an examination of the proviso, he maintains that the language of that proviso does not include the Secretary for the Department of War. If he is not included in the language of the proviso, then upon the admission of the counsel he is included in the body of the bill, so that for the purposes of this investigation and trial it is wholly immaterial whether the proviso applies to him or not. If the proviso does not apply to the Secretary for the Department of War, then he holds his office, as in the body of the section expressed, until removed therefrom by and with the advice and consent of the Senate. If he is covered by the language of the proviso, then a limitation is fixed to his office, to wit: that it is to expire one month after the close of the term of the President by whom he has been appointed, subject, however, to previous removal by and with the advice and consent of the Senate.

I have already considered the question of intent on the part of the President, and maintained that in the wilful violation of the law he discloses a criminal

intent which cannot be controlled or qualified by any testimony on the part of the respondent.

The counsel for the respondent, however, has dwelt so much at length on the question of intent, and such efforts have been made during the trial to introduce testimony upon this point, that I am justified in recurring to it for a brief consideration of the arguments and views bearing upon and relating to that question. If a law passed by Congress be equivocal or ambiguous in its terms, the Executive, being called upon to administer it, may apply his own best judgment to the difficulties before him, or he may seek counsel from his official advisers or other proper persons; and acting thereupon, without evil intent or purpose, he would be fully justified, and upon no principle of right could he be held to answer as for a misdemeanor in office. But that is not this case. The question considered by Mr. Johnson did not relate to the meaning of the tenure-of-office act. He understood perfectly well the intention of Congress, and he admitted in his veto message that that intention was expressed with sufficient clearness to enable him to comprehend and state it. In his veto message of the 2d of March, 1867, after quoting the first section of the bill to regulate the tenure of certain civil offices, he says:

> In effect the bill provides that the President shall not remove from their places *any civil officers* whose terms of service are not limited by law without the advice and consent of the Senate of the United States. The bill, in this respect, conflicts, in my judgment, with the Constitution of the United States.

His statement of the meaning of the bill relates to all civil officers, to the members of his cabinet as well as to others, and is a declaration that, under that bill, if it became a law, none of those officers could be removed without the advice and consent of the Senate. He was, therefore, in no doubt as to the intention of Congress as expressed in the bill submitted to him for his consideration, and which afterwards became the law of the land. He said to the Senate, "If you pass this bill, I cannot remove the members of my cabinet." The Senate and the House in effect said, "We so intend," and passed the bill by a two-thirds majority. There was then no misunderstanding as to the meaning or intention of the act. His offence, then, is not, that upon an examination of the statute he misunderstood its meaning and acted upon a misinterpretation of its true import, but that understanding its meaning precisely as it was understood by the Congress that passed the law, precisely as it is understood by the House of Representatives to-day, precisely as it is presented in the articles of impeachment, and by the managers before this Senate, he, upon his own opinion that the same was unconstitutional, deliberately, wilfully and intentionally disregarded it. The learned counsel say that he had a right to violate this law for the purpose of obtaining a judicial determination. This we deny. The constitutional duty of the President is to obey and execute the laws. He has no authority under the Constitution, or by any law, to enter into any schemes or plans for the purpose of testing the validity of the laws of the country, either judicially or otherwise. Every law of Congress may be tested in the courts, but it is not made the duty of any person to so test the laws. It is not specially the right of any person to so test the laws, and the effort is particularly offensive in the Chief Magistrate of the country to attempt by any process to annul, set aside or defeat the laws which by his oath he is bound to execute. Nor is it any answer to say, as is suggested by the counsel for the respondent, that "there never could be a judicial decision that a law is unconstitutional, inasmuch as it is only by disregarding a law that any question can be raised judicially under it." If this be true, it is no misfortune. But the opposite theory, that it is the duty or the right of the President to disregard a law for the purpose of ascertaining judicially whether he has a right to violate a law, is abhorrent to every just principle of government, and dangerous in the highest degree to the existence of free institutions.

Digitized by Google

But his alleged purpose to test the law in the courts is shown to be a pretext merely. Upon his own theory of his rights, he could have instituted proceedings by information in the nature of a *quo warranto* against Mr. Stanton on the 13th of January, 1868. More than three months have passed, and he has done nothing whatever. When by Mr. Stanton's action Lorenzo Thomas was under arrest, and proceedings were instituted which might have tested the legality of the tenure-of-office act, Mr. Cox, the President's special counsel, moved to have the proceedings dismissed, although Thomas was at large upon his own recognizance. Can anybody believe that it was Mr. Johnson's purpose to test the act in the courts? But the respondent's insincerity, his duplicity, is shown by the statement which he made to General Sherman in January last. Sherman says, "I asked him why lawyers could not make a case, and not bring me, or an officer, into the controversy? His answer was, 'that it was found impossible, or a case could not be made up;' 'but,' said he, 'if we can bring the case to the courts, it would not stand half an hour.'" He now says his object was to test the case in the courts. To Sherman he declares that a case could not be made up, but if one could be made up the law would not stand half an hour. When a case was made up which might have tested the law, he makes haste to get it dismissed. Did ever audacity and duplicity more clearly appear in the excuses of a criminal?

This brief argument upon the question of intent seems to me conclusive, but I shall incidentally refer to this point in the further progress of my remarks.

The House of Representatives does not demand the conviction of Andrew Johnson, unless he is guilty in the manner charged in the articles of impeachment; nor does the House expect the managers to seek a conviction except upon the law and the facts considered with judicial impartiality. But I am obliged to declare that I have no capacity to understand those processes of the human mind by which this tribunal, or any member of this tribunal, can doubt, can entertain a reasonable doubt, that Andrew Johnson is guilty of high misdemeanors in office, as charged in each of the first three articles exhibited against him by the House of Representatives.

We have charged and proved that Andrew Johnson, President of the United States, issued an order in writing for the removal of Edwin M. Stanton from the office of Secretary for the Department of War while the Senate of the United States was in session, and without the advice and consent of the Senate, in violation of the Constitution of the United States and of his oath of office, and of the provisions of an act passed March 2, 1867, entitled "An act regulating the tenure of certain civil offices," and that he did this with intent so to do; and thereupon, we demand his conviction under the first of the articles of impeachment exhibited against him by the House of Representatives.

We have charged and proved that Andrew Johnson, President of the United States, violated the Constitution and his oath of office, in issuing an order for the removal of Edwin M. Stanton from the office of Secretary for the Department of War during the session of the Senate, and without the advice and consent of the Senate, and this without reference to the tenure-of-office act; and thereupon we demand his conviction under the first of the articles of impeachment exhibited against him by the House of Representatives.

We have charged and proved that Andrew Johnson, President of the United States, did issue and deliver to one Lorenzo Thomas a letter of authority in writing authorizing and empowering said Thomas to act as Secretary of War *ad interim*, there being no vacancy in said office, and this while the Senate of the United States was in session, and without the advice and consent of the Senate, in violation of the Constitution of the United States, of his oath of office, and of the provisions of an act entitled "An act regulating the tenure of certain civil offices," and all this with the intent so to do; and, thereupon, we demand his

Digitized by Google

conviction under the second of the articles of impeachment exhibited against him by the House of Representatives.

We have charged and proved that Andrew Johnson, President of the United States, in the appointment of Lorenzo Thomas to the office of Secretary of War *ad interim*, acted without authority of law, and in violation of the Constitution and of his oath of office; and this without reference ot the tenure-of-office act; and thereupon we demand his conviction under the third of the articles of impeachment exhibited against him by the House of Representatives.

At this point the honorable manager yielded for an adjournment.

Mr. CONKLING. I move that the Senate sitting for this trial adjourn.

The CHIEF JUSTICE. The Senator from New York moves that the Senate sitting as a court of impeachment adjourn until to-morrow at eleven o'clock.

The motion was agreed to; and the Senate sitting for the trial of the impeachment adjourned.

THURSDAY, *April* 23, 1868.

The Chief Justice of the United States took the chair.

The usual proclamation having been made by the Sergeant-at-Arms,

The managers of the impeachment on the part of the House of Representatives and the counsel for the respondent, except Mr. Stanbery, appeared and took the seats assigned to them respectively.

The members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

The CHIEF JUSTICE. The Secretary will read the minutes of yesterday's proceedings.

The journal of the Senate sitting yesterday for the trial of the impeachment was read.

Mr. GRIMES. Mr. Chief Justice, I ask leave to offer an order which will lie over if there be any objection made to it.

The CHIEF JUSTICE. The Secretary will read the order proposed by the Senator from Iowa.

The chief clerk read as follows:

Ordered, That hereafter the hour for the meeting of the Senate, sitting for the trial of the impeachment of Andrew Johnson, President of the United States, shall be 12 o'clock meridian, of each day except Sunday.

The CHIEF JUSTICE. Is there any objection to the present consideration of the proposed order?

Mr. SUMNER. I object.

The CHIEF JUSTICE. Objection is made, and it will lie over. Mr. Manager Boutwell will please proceed with his argument.

Mr. Manager BOUTWELL. Mr. President, Senators, the learned counsel for the respondent seems to have involved himself in some difficulty concerning the articles which he terms the conspiracy articles, being articles 4, 5, 6, and 7. The allegations contained in articles 4 and 6 are laid under the act of July 31, 1861, known as the conspiracy act. The remarks of the learned counsel seem to imply that articles 5 and 7 were not based upon any law whatever. In this he greatly errs. An examination of articles 4 and 5 shows that the substantive allegation is the same in each, the differences being, that article 4 charges the conspiracy with intent, by intimidation and threats, unlawfully to hinder and prevent Edwin M. Stanton from holding the office of Secretary for the Department of War. The persons charged are the respondent and Lorenzo Thomas. And it is alleged that this conspiracy for the purpose set forth was in violation of the

Constitution of the United States, and of the provisions of an act entitled "An act to punish certain conspiracies," approved July 31, 1861. The fifth article charges that the respondent did unlawfully conspire with one Lorenzo Thomas, and with other persons, to prevent the execution of the act entitled "An act regulating the tenure of certain civil offices," and that in pursuance of that conspiracy, they did unlawfully attempt to prevent Edwin M. Stanton from holding the office of Secretary for the Department of War. It is not alleged in the article that this conspiracy is against any particular law, but it is alleged that the parties charged did unlawfully conspire. It is very well known that conspiracies are of two kinds. Two or more persons may conspire to do a *lawful* act by *unlawful* means; or two or more persons may conspire to do an *unlawful* act by *lawful* means. By the common law of England such conspiracies have always been indictable and punishable as misdemeanors. The State of Maryland was one of the original 13 States of the Union, and the common law of England has always prevailed in that State, except so far as it has been modified by statute. The city of Washington, was originally within the State of Maryland, but it was ceded to the United States under the provisions of the Constitution. By a statute of the United States, passed February 27, 1801, (Statutes at Large, vol. 2, p. 103,) it is provided:

That the laws of the State of Maryland, as they now exist, shall be, and continue in force in that part of the said District which was ceded by that State to the United States, and by them accepted as aforesaid.

By force of this statute, although probably the law would have been the same without legislation, the English common law of crimes prevails in the city of Washington. By another statute entitled "An act for the punishment of crimes in the District of Columbia," (Statutes at Large, vol. 4, p. 450,) approved March 2, 1831, special punishments are affixed to various crimes enumerated, when committed in the District of Columbia. But conspiracy is not one of the crimes mentioned. The 15th section of that act provides:

That every other felony, misdemeanor, or offence, not provided for by this act, may, and shall be punished as heretofore, except that in all cases where whipping is part or the whole of the punishment, except in the cases of slaves, the court shall substitute therefor imprisonment in the county jail, for a period not exceeding six months.

And the 16th section declares:

That all definitions and descriptions of crimes, all fines, forfeitures, and incapacities, the restitution of property, or the payment of the value thereof, and every other matter not provided for in this act, be and the same shall remain as heretofore.

There can then be no doubt that, under the English common law of crimes, sanctioned and continued by the statutes of the United States in the District of Columbia, the 5th and 7th articles set forth offences which are punishable as misdemeanors by the laws of the District.

Article 6 is laid under the statute of 1861, and charges that the respondent did unlawfully conspire with Lorenzo Thomas, by force to seize, take, and possess the property of the United States in the Department of War, and this with intent to violate and disregard the act entitled "An act regulating the tenure of certain civil offices." The words used in the conspiracy act of 1861 leave room for argument upon the point raised by the learned counsel for the respondent. I admit that the District of Columbia is not included by specific designation, but the reasons for the law and the natural interpretation of the language justify the view that the act applies to the District. I shall refer to a single authority upon the point.

The internal duties act of August 2, 1813, (Stat., vol. 3, p. 82,) subjects, in express terms, the "several Territories of the United States and the District of Columbia" to the payment of the taxes imposed; upon which the question arose whether Congress has power to impose a direct tax on the District of Columbia, in view of the fact that by the Constitution it is provided that "repre-

sentation and direct taxes shall be apportioned among the several States, which may be included within the Union, according to their respective numbers."

In the case of Loughborough *vs.* Blake, the Supreme Court of the United States unanimously decided, in a brief opinion by Chief Justice Marshall, that although the language of the Constitution apparently excepts the District of Columbia from the imposition of direct taxes, yet the reason of the thing requires us to consider the District as being comprehended, in this respect, within the intention of the Constitution. (Lough. *vs.* Blake, 5 Wheaton, p. 317.)

The reasoning of the Supreme Court and its conclusion in this case were satisfactory to the bar and the country, and no person has deemed it worth while to raise the question anew under the direct tax act of August 5, 1861, [Sts. xii, 296,] which also comprehends the Territories and the District of Columbia.

But the logical rules of construction applicable to an act of Congress are the same as those applicable to the Constitution. An act of Congress and the Constitution are both laws—nothing more, nothing less—except that the latter is of superior authority. And if, in the construction of the Constitution, it may be satisfactorily maintained that the District of Columbia is to be deemed, because of the reason of things, to be comprehended by a provision of the Constitution which in words, and in their superficial construction, excludes it, must not the same rule of construction produce the same result in the determination of the legal intent and import of an act of Congress, when an obscurity exists in the latter and for the same cause?

The 7th article is laid upon the common law, and charges substantially the same offences as those charged in the 6th article. The result then is, that the 5th and 7th articles, which are based upon the common law, set forth substantially the same offences which are set forth in the 4th and 6th articles, which are laid upon the statute of July 31, 1861; and as there can be no doubt of the validity of the 5th and 7th articles, it is practically immaterial whether the suggestion made by the counsel for the respondent, that the conspiracy act of 1861 does not include the District of Columbia, is a valid suggestion or not. Not doubting that the Senate will find that the charge of conspiracy is sufficiently laid under existing laws in all the articles, I proceed to an examination of the evidence by which the charge is supported.

It should always be borne in mind that the evidence in proof of conspiracy will generally, from the nature of the crime, be circumstantial; and this case in this particular is no exception to the usual experience in criminal trials. We find, in the first place, if the allegations in the first, second, and third articles have been established, that the President was engaged in an unlawful act. If we find Lorenzo Thomas or any other person co-operating with him upon an agreement or an understanding, or an assent on the part of such other person to the prosecution of such unlawful undertaking, an actual conspiracy is proved. The existence of the conspiracy being established, it is then competent to introduce the statements and acts of the parties to the conspiracy, made and done while the conspiracy was pending, and in furtherance of the design; and it is upon this ground that testimony has been offered and received of the declarations made by Lorenzo Thomas, one of the parties to the conspiracy, subsequent to the 18th of January, 1868, or perhaps to the 13th of January, 1868—the day on which he was restored to the office of Adjutant General of the army of the United States by the action of the President, and which appears to have been an initial proceeding on his part for the purpose of accomplishing his unlawful design—the removal of Mr. Stanton from the office of Secretary for the Department of War. The evidence of agreement between the respondent and Thomas is found in the order of the 21st of February, 1868, appointing Thomas, and in the conversation which occurred at the time the order was placed in Thomas's hands. The counsel for the respondent at this point was involved in a very serious difficulty. If he had admitted (which he took care not to do) that the order was

purely a military one, he foresaw that the respondent would be involved in the crime of having issued a military order which did not pass through the General of the army, and thus would be liable to impeachment and removal from office for violating the law of the 2d of March, 1867, entitled "An act making appropriations for the support of the army for the fiscal year ending June 30, 1868, and for other purposes." If he had declared that it was not a military order, then the transaction confessedly was in the nature of an agreement between the President and Lorenzo Thomas; and if the act contemplated by that agreement was an unlawful act, or if the act were lawful, and the means employed for accomplishing it were unlawful, then clearly the charge of conspiracy would be maintained. Hence he was careful to say, in denying that the order was a military order, that it nevertheless "invoked that spirit of military obedience which constitutes the strength of the service." And further, he says of Thomas, that, as a faithful Adjutant General of the army of the United States, interested personally, professionally, and patriotically to have the office of Secretary of the Department of War performed in a temporary vacancy, was it not his duty to accept the appointment unless he knew that it was unlawful to accept it? The admissions and statements of the learned counsel are to the effect, on the whole, that the order was not a military order, nor do we claim that it was a military order, but it was a letter addressed to General Thomas, which he could have declined altogether, without subjecting himself to any punishment by a military tribunal. This is the crucial test of the character of the paper which he received, and on which he proceeded to act. Ignorance of the law, according to the old maxim, excuses no man; and whether General Thomas, at the first interview he had with the President on the 18th of January, 1868, or at his interview with him on the day when he received the letter of appointment, knew that the President was then engaged in an unlawful act, is not material to this inquiry. The President knew that his purpose was an unlawful one, and he then and there induced General Thomas to co-operate with him in the prosecution of the unlawful design. If General Thomas was ignorant of the illegal nature of the transaction, that fact furnishes no legal defence for him, even though morally it might be an excuse for his conduct. But certainly the President, who did know the illegal nature of the proceeding, cannot excuse himself by asserting that his co-conspirator was at the time ignorant of the illegal nature of the business in which they were engaged.

It being proved that the respondent was engaged in an unlawful undertaking in his attempt to remove Mr. Stanton from the office of Secretary for the Department of War, that by an agreement or understanding between General Thomas and himself they were to co-operate in carrying this purpose into execution, and it being proved, also, that the purpose itself was unlawful, all the elements of a conspiracy are fully established; and it only remains to examine the testimony in order that the nature of the conspiracy may more clearly appear, and the means by which the purpose was to be accomplished may be more fully understood.

The statement of the President in his message to the Senate under date of 12th of December, 1867, discloses the depth of his feeling and the intensity of his purpose in regard to the removal of Mr. Stanton. In that message he speaks of the bill regulating the tenure of certain civil offices at the time it was before him for consideration. He says: "The bill had not then become a law; the limitation upon the power of removal was not yet imposed, and there was yet time to make any changes. If any one of those gentlemen (meaning the members of his cabinet) had then said to me that he would avail himself of the provisions of that bill in case it became a law, I should not have hesitated a moment as to his removal."

When, in the summer of 1867, the respondent became satisfied that Mr. Stanton not only did not enter into the President's schemes, but was opposed to them, and he determined upon his suspension and final removal from the office of Secretary for

the Department of War, he knew well that the confidence of the people in Mr. Stanton was very great, and that they would not accept his removal and an appointment to that important place of any person of doubtful position, or whose qualifications were not known to the country. Hence he sought, through the suspension of Mr. Stanton and the appointment of General Grant as Secretary of War *ad interim*, to satisfy the country for the moment, but with the design to prepare the way thereby for the introduction into the War Department of one of his own creatures. At that time it was supposed that the suspension of Mr. Stanton and the appointment of General Grant were made under and by virtue of the act regulating the tenure of certain civil offices; and although the conduct of the President during a period of nearly six months in reference to that office was in conformity to the provisions of that act, it was finally declared by him that what he had done had been done in conformity to the general power which he claims, under the Constitution, and that he did not in any way recognize the act as constitutional or binding upon him. His message to the Senate of the 12th of December was framed apparently in obedience to the tenure-of-office act. He charged Mr. Stanton with misconduct in office, which, by that act, had been made a ground for the suspension of a civil officer; he furnished reasons and evidence of misconduct which, as he alleged, had been satisfactory to him, and he furnished such reasons and evidence within twenty days after the meeting of the Senate next following the day of suspension.

All this was in conformity to the statute of March 2, 1867. The Senate proceeded to consider the evidence and reasons furnished by the President, and in conformity to that act passed a resolution, adopted on the 13th of January, 1868, declaring that the reasons were unsatisfactory to the Senate, and that Mr. Stanton was restored to the office of Secretary for the Department of War. Up to that time there had been no official statement or declaration by the President that he had not acted under the tenure-of-office act; but he now assumed that that act had no binding force, and that Mr. Stanton was not lawfully restored to the office of Secretary for the Department of War.

Upon the adoption of the resolution by the Senate, General Grant at once surrendered the office to Mr. Stanton. This act upon his part filled the President with indignation both towards General Grant and Mr. Stanton, and from that day he seems to have been under the influence of a settled and criminal purpose to destroy General Grant and to secure the removal of Mr Stanton. During the month following the restoration of Mr. Stanton the President attempted to carry out his purpose by various and tortuous methods. First, he endeavored to secure the support of General Sherman. On two occasions, as is testified by General Sherman, on the 27th and 31st of January, he tendered him the position of Secretary of War *ad interim*. It occurred very naturally to General Sherman to inquire of the President whether Mr. Stanton would retire voluntarily from the office; and also to ask the President what he was to do, and whether he would resort to force if Mr. Stanton would not yield. The President answered, "Oh, he will make no objection; you present the order and he will retire." Upon a doubt being expressed by General Sherman, the President remarked, "I know him better than you do; he is cowardly." The President knew Mr. Stanton too well to entertain any such opinion of his courage as he gave in his answer to General Sherman; the secret of the proceeding, undoubtedly, was this: He desired in the first place to induce General Sherman to accept the office of Secretary of War *ad interim* upon the assurance on his part that Mr. Stanton would retire willingly from his position, trusting that when General Sherman was appointed to and had accepted the place of Secretary of War *ad interim*, he could be induced, either upon the suggestion of the President or under the influence of a natural disinclination on his part to fail in the accomplishment of anything which he had undertaken, to seize the War Department by force. The President very well knew that if General Sherman accepted the office of Secretary of War *ad interim* he would

be ready at the earliest moment to relinquish it into the hands of the President, and thus he hoped through the agency of General Sherman to secure the possession of the Department for one of his favorites.

During the period from the 13th day of January to the 21st of February he made an attempt to enlist General George H. Thomas in the same unlawful undertaking. Here, also, he was disappointed. Thus it is seen that from August last, the time when he entered systematically upon his purpose to remove Mr. Stanton from the office of Secretary for the Department of War, he has attempted to secure the purpose he had in view through the personal influence and services of the three principal officers of the army; and that he has met with disappointment in each case. Under these circumstances nothing remained for the respondent but to seize the office by an open, wilful, defiant violation of law; and as it was necessary for the accomplishment of his purpose that he should obtain the support of some one, and as his experience had satisfied him that no person of capacity, or respectability, or patriotism would unite with him in his unlawful enterprise, he sought the assistance and aid of Lorenzo Thomas. This man, as you have seen him, is an old man, a broken man, a vain man, a weak man, utterly incapable of performing any important public service in a manner creditable to the country; but possessing, nevertheless, all the qualities and characteristics of a subservient instrument and tool of an ambitious, unscrupulous man. He readily accepted the place which the President offered him, and there is no doubt that the declarations which he made to Wilkeson, Burleigh and Karsner, were made when he entertained the purpose of executing them, and made also in the belief that they were entirely justified by the orders which he had received from the President, and that the execution of his purpose to seize the War Department by force would be acceptable to the President. That he threatened to use force there is no doubt from the testimony, for he has himself confessed substantially the truth of the statements made by all the witnesses for the prosecution who have testified to that fact.

These statements were made by Thomas on and after the 21st of February, when he received his letter of authority, in writing, to take possession of the War Department. The agreement between the President and Thomas was consummated on that day. With one mind they were then, and on subsequent days, engaged and up to the present time they are engaged in the attempt to get possession of the War Department. Mr. Stanton, as the Senate by its resolution has declared, being the lawful Secretary of War, this proceeding on their part was an unlawful proceeding. It had in view an unlawful purpose; it was therefore in contemplation of the law a conspiracy, and the President is consequently bound by the declarations made by Thomas in regard to taking possession of the War Department by force. Thomas admits that on the night of the 21st it was his purpose to use force; but on the morning of the 22d his mind had undergone a change and he then resolved not to use force. We do not know precisely the hour when his mind underwent this change, but the evidence discloses that upon his return from the supreme court of the District, where he had been arraigned upon a complaint made by Mr. Stanton, which, according to the testimony, was 12 o'clock, or thereabouts, he had an interview with the President; and it is also in evidence that at or about the same time the President had an interview with General Emory, from whom he learned that that officer would not obey a command of the President unless it passed through General Grant, as required by law.

The President understood perfectly well that he could neither obtain force from General Grant nor transmit an order through General Grant for the accomplishment of a purpose manifestly unlawful; and inasmuch as General Emory had indicated to him, in the most distinct and emphatic manner, his opinion that the law requiring all orders to pass through the headquarters of the General commanding was constitutional, indicating also his purpose to obey the

law, it was apparent that at that moment the President could have had no hope of obtaining possession of the Department of War by force. It is a singular coincidence in the history of this case that at or about the same time General Thomas had an interview with the President and came to the conclusion that it would not be wise to resort to force.

The President has sought to show his good intention by the fact that, on the 22d or the 24th of February, he nominated Hon. Thomas Ewing, sen., as Secretary for the Department of War. Mr. Ewing is not an unknown man. He has been a member of the Senate and the head of the Treasury Department. His abilities are undoubted, but at the time of his nomination he was in the seventy-ninth year of his age, and there was no probability that he would hold the office a moment longer than his sense of public duty required. It was the old game of the President—the office in the hands of his own tool or in the hands of a man who would gladly vacate it at any moment. This was the necessity of his position, and throws light upon that part of his crime which is set forth in the eleventh article.

For, in fact, his crime is one—the subversion of the government. From the nature of the case we are compelled to deal with minor acts of criminality by which he hoped to consummate this greatest of crimes.

In obedience to this necessity he appointed Grant, hoping to use him and his influence with the army, and failing in this, to get possession of the place and fill it with one of his own satellites. Foiled and disappointed in this scheme, he sought to use, first, General Sherman, then General George H. Thomas, then Hon. Thomas Ewing, sen., knowing that neither of these gentlemen would retain the office for any length of time. There were men in the country who would have accepted the office and continued in it, and obeyed the Constitution and the laws. Has he named any such person; has he suggested any such person? His appointments and suggestions of appointments have been of two sorts—honorable men, who would not continue in the office, or dishonorable, worthless men, who were not fit to hold the office.

The name of General Cox, of Ohio, was mentioned in the public journals; it was mentioned, probably, to the President. Did it meet with favor? Did he send his name to the Senate? No.

General Cox if he had accepted the office at all, would have done so with the expectation of holding it till March, 1869, and with the purpose of executing the duties of the trust according to the laws and the Constitution. These were purposes wholly inconsistent with the President's schemes of usurpation. But is it to be presumed or imagined that when the President issued his order for the removal of Mr. Stanton, and his letter of authority to Lorenzo Thomas, on the 21st of February, he had any purpose of appointing Mr. Ewing Secretary of War? Certainly not. On the afternoon of the 21st he informs his cabinet that Stanton is removed, and that Thomas has possession of the office. He then so believed. Thomas had deceived or misled him. On the 22d instant he had discovered that Stanton held on to the place, and that Emory could not be relied upon for force.

What was now his necessity? Simply a resort to his old policy. He saw that it was necessary to avoid impeachment if possible, and also to obtain the sanction of the Senate to a nomination which would work the removal of Mr. Stanton, and thus he would triumph over his enemies and obtain condonation for his crimes of the 21st of February. A well-laid scheme, but destined to fail and to furnish evidence of his own guilty purposes. With the office in the possession of Mr. Ewing, he foresaw that for the prosecution of his own plans the place would always be vacant.

Thus has this artful man pursued the great purpose of his life. Consider the other circumstances. On the 1st of September last General Emory was appointed to the command of the department of Washington. He has exhibited such sterling honesty and vigorous patriotism in these recent troubles and

during the war, that he can bear a reference to his previous history. He was born in Maryland, and in the early part of the war the public mind of the North questioned his fidelity to the Union. His great services and untarnished record during the war are a complete defence against all suspicion, but is it too much to believe that Mr. Johnson entertained the hope that General Emory might be made an instrument of his ambition? Nobly has General Emory undeceived the President and gained additional renown in the country. In General Lorenzo Thomas the President was not deceived. His complicity in recent unlawful proceedings justifies the suspicions entertained by the country in 1861 and 1862 touching his loyalty. Thomas and the President are in accord. In case of the acquittal of the President, they are to issue an order to General Grant putting Thomas in possession of the reports of the army to the War Department.

Is there not in all this evidence of the President's criminal intention? Is not his whole course marked by duplicity, deception, and fraud? "All things are construed against the wrong-doer," is the wise and just maxim of the law. Has he not trifled with and deceived the Senate? Has he not attempted to accomplish an unlawful purpose by disingenuous, tortuous, criminal means? His criminal intent is in his wilful violation of the law, and his criminal intent is moreover abundantly proved by all the circumstances attending the violation of the law.

His final resort for safety was to the Senate, praying for the confirmation of Mr. Ewing. On the 21st of February he hoped that Stanton would yield willingly, or that Emory could be used to remove him. On the 22d he knew that Stanton was determined to remain, that Emory would not furnish assistance, that it was useless to appeal to Grant. He returns to his old plan of filling the War Office by the appointment of a man who would yield the place at any moment; and now he asks you to accept an act as his justification which act was the last resort of a criminal attempting to escape the judgment due to his crimes. Upon this view of the law and the facts, we demand a conviction of the respondent upon articles four, five, six and seven exhibited against him by the House of Representatives.

The evidence introduced tending to show a conspiracy between Johnson and Thomas to get possession of the War Department tends also, connected with other facts, to show the purpose of the President to obtain possession of the Treasury Department. Bearing in mind his claim that he can suspend or remove from office, without the advice and consent of the Senate, any civil officer, and bearing in mind also that the present Secretary of the Treasury supports this claim, and every obstacle to the possession of the Treasury Department is removed. If the Secretary should decline to co-operate, it would only be necessary for the President to remove him from office and place the Treasury Department in the hands of one of his own creatures.

Upon the appointment of Thomas as Secretary of War *ad interim* the President caused notice to be given thereof to the Secretary of the Treasury, accompanied with the direction, under the President's own hand, to that officer to govern himself accordingly. It is also proved that on the 22d day of December Mr. Johnson appointed Mr. Cooper, who had been his private secretary and intimate friend, Assistant Secretary of the Treasury.

The evidence fully sustains the statements made in the opening argument of Manager Butler, in support of article nine. The facts in regard to General Emory's interview with the President were then well known to the managers, and the argument and view presented in the opening contain all that is necessary to be said upon that article.

The learned counsel who opened the case for the President seems not to have comprehended the nature of the offence set forth in the 10th article. His remarks upon that article proceeded upon the idea that the House of Representatives arraign the President for slandering or libelling the Congress of the

United States. No such offence is charged; nor is it claimed by the managers that it would be possible for Mr. Johnson, or any other person, to libel or slander the government. It is for no purpose of protection or indemnity or punishment that we arraign Mr. Johnson for words spoken in Washington, Cleveland, and St. Louis. We do not arraign him for the words spoken; but the charge in substance is, that a man who could utter the words, which, as is proved, were uttered by him, is unfit for the office he holds. We claim that the common law of crimes, as understood and enforced by Parliament in cases of impeachment, is in substance this: that no person in office shall do any act contrary to the good morals of the office; and that, when any officer is guilty of an act contrary to the good morals of the office which he holds, that act is a misdemeanor for the purpose of impeachment and removal from office.

Judge Chase was impeached, and escaped conviction by four votes only, for words spoken from the bench of the circuit court sitting in Baltimore; words which are decorous and reputable when compared with the utterances of Mr. Johnson. Judge Humphreys was convicted and removed from office for words spoken, treasonable in character, but not as much calculated to weaken and bring the government of the United States into contempt as were the words uttered by Mr. Johnson in his speech of the 18th of August, 1866. Judge Humphreys was convicted by the unanimous vote of the senators, nineteen of whom now sit on this trial. If a magistrate can ever be guilty, for words spoken, of an impeachable misdemeanor, there can be no doubt that Mr. Johnson is so guilty.

I ask you to consider in comparison, or in contrast, the nature of the language used by Chase, Humphreys, and Johnson, as set forth in the articles of impeachment preferred in the several cases.

The eighth article in the case of Chase is in these words:

And whereas mutual respect and confidence between the government of the United States and those of the individual States, and between the people and those governments, respectively, are highly conducive to that public harmony without which there can be no public happiness, yet the said Samuel Chase, disregarding the duties and dignity of his judicial character, did, at the circuit court for the district of Maryland, held at Baltimore in the month of May, 1803, pervert his official right and duty to address the grand jury then and there assembled, on the matters coming within the province of the said jury, for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury, and of the good people of Maryland against their State government and constitution, a conduct highly censurable in any, but peculiarly indecent and unbecoming in a judge of the Supreme Court of the United States; and, moreover, that the said Samuel Chase, then and there, under pretence of exercising his judicial right to address the said grand jury as aforesaid, did, in a manner highly unwarrantable, endeavor to excite the odium of the said grand jury, and of the good people of Maryland, against the government of the United States, by delivering opinions which, even if the judiciary were competent to their expression, on a suitable occasion and in a proper manner, were, at that time, and as delivered by him, highly indecent, extra-judicial, and tending to prostitute the high judicial character with which he was invested to the low purpose of an electioneering partisan.

The first article against Humphreys was as follows:

That, regardless of his duties as a citizen of the United States, and unmindful of the duties of his said office, and in violation of the sacred obligation of his official oath, "to administer justice without respect to persons," "and faithfully and impartially discharge all the duties incumbent upon him as judge of the district court of the United States for the several districts of the State of Tennessee, agreeable to the Constitution and laws of the United States," the said West H. Humphreys, on the 29th day of December, A. D. 1860, in the city of Nashville, in said State, the said West H. Humphreys then being a citizen of the United States, and owing allegiance thereto, and then and there being judge of the district court of the United States for the several districts of said State, at a public meeting on the day and year last aforesaid, held in said city of Nashville, and in the hearing of divers persons then and there present, did endeavor by public speech to incite revolt and rebellion within said State against the Constitution and government of the United States, and did then and there publicly declare that it was the right of the people of said State, by an ordinance of secession, to absolve themselves from all allegiance to the government of the United States, the Constitution and laws thereof.

Digitized by Google

The offence with which Humphreys is charged in this article was committed on the 29th day of December, 1860, before the fall of Sumter, and when only one State had passed an ordinance of secession. The declaration was merely a declaration in a public speech that the State of Tennessee had the right to secede from the Union.

The President, in his speech of the 18th of August, 1866, at Washington, says:

We have witnessed in one department of the government every effort, as it were, to prevent the restoration of peace, harmony, and union; we have seen, as it were, hanging upon the verge of the government, as it were, a body calling or assuming to be the Congress of the United States, when it was but a Congress of a part of the States; we have seen Congress assuming to be for the Union when every step they took was to perpetuate dissolution, and make dissolution permanent. We have seen every step that has been taken, instead of bringing about reconciliation and harmony, has been legislation that took the character of penalties, retaliation, and revenge. This has been the course; this has been the policy of one department of your government.

These words have been repeated so frequently, and the public ear is so much accustomed to them, that they have apparently lost their influence upon the public mind. But it should be observed that these words, as has been proved by the experience of two years, were but the expression of a fixed purpose of the President. His design was to impair, to undermine, and, if possible, to destroy the influence of Congress in the country. Having accomplished this result, the way would then have been open to him, for the prosecution of his criminal design, to reconstruct the government in the interest of the rebels, and, through his influence with them, to secure his own election to the presidency in 1868. It must, however, be apparent that the words in the speech of Mr. Johnson are of graver import than the words which were spoken by Judge Chase to the grand jury at Baltimore, or those uttered by Judge Humphreys to the people of Tennessee. And yet the latter was convicted by a unanimous vote of this Senate; and the former escaped conviction by four votes only. These words are of graver import, not merely in the circumstance that they assail a department of the government, but in the circumstance that they were uttered by the President of the United States in the Executive Mansion, and in his capacity as President of the United States, when receiving the congratulations and support of a portion of the people of the country, tendered to him in his office as Chief Magistrate. Judge Chase, although a high officer of the government, was without political influence and without patronage; his personal and official relations were limited, and his remarks were addressed to the grand jury of a judicial district of the country merely.

Judge Humphreys was comparatively unknown; and although his words were calculated to excite the citizens of Tennessee, and induce them to engage in unconstitutional undertakings, his influence was limited measurably to the people of that State.

Mr. Johnson addressed the whole country; and holding in his hands the immense patronage and influence belonging to the office of President, he was able to give practical effect to the declarations he then made. The nature of the respondent's offence is illustrated by the law in reference to the duty of officers and soldiers of the army, although the law is not applicable to the President.

Any officer or soldier who shall use contemptuous or disrespectful words against the President of the United States, against the Vice President thereof, against the Congress of the United States, shall be cashiered or otherwise punished, as a court-martial shall direct. (Statutes at Large, vol. 2, p. 360, April 10, 1866.)

Moreover, in the case of Judge Chase, as is stated by Mr. Dane in his "Abridgment," (vol. 7, chap. 222)—

On the whole evidence, it remained in doubt what words he did utter. The proof of seditious intent rested solely on the words themselves; and as the words were not clearly proved, the intent was in doubt.

Digitized by Google

In the case of Mr. Johnson there is no doubt about the words uttered; they have been fully and explicitly proved. Indeed, they are not denied by the respondent. The unlawful intent with which he uttered the words not only appears from the character of the language employed, but it is proved by the history of his administration. In his message of the 22d of June, 1866, relating to the constitutional amendment, in his annual message of December, 1866, and in numerous other declarations, he has questioned, and substantially denied, the legality of the Congress of the United States.

In the trial of Judge Chase it was admitted by the respondent "that for a judge to utter seditious sentiments with intent to excite sedition would be an impeachable offence." (Dane's Abridgement, vol. 7, c. 222.) And this, not under the act known as "the sedition act;" for that had been previously repealed; but upon the general principle that an officer, whose duty it is to administer the law, has no right to use language calculated to stir up resistance to the law. If this be true of a judge, with stronger reason it is true of the President of the United States, that he should set an example of respect for all the departments of the government, and of reverence for and obedience to the laws of the land.

The speeches made by the President at Cleveland and St. Louis, which have been proved and are found in the record of the case, contain numerous passages similar in character to that extracted from his speech of the 18th of August, 1866, and all calculated and designed to impair the just authority of Congress. While these declarations have not been made the basis of substantive charges in the articles of impeachment, they furnish evidence of the unlawful intent of the President in his utterance of the 18th of August, and also of the fact that that utterance was not due to any temporary excitement or transient purpose which passed away with the occasion which had called it forth. It was a declaration made in accordance with a fixed design, which had obtained such entire control of his nature that whenever he addressed public assemblies he gave expression to it. The evidence which has been submitted by the respondent bearing upon the tenth article indicates a purpose, in argument, to excuse the President upon the ground that the remarks of the people stimulated, irritated, and excited him to such an extent that he was not wholly responsible for what he said. If this were true, it would exhibit great weakness of character; but as a matter of fact it is not true. The taunts and gibes of the people served only to draw from him those declarations which were in accord with the purpose of his life. This is shown by the fact that all his political declarations made at Cleveland and at St. Louis, though made under excitement, are in entire harmony with the declarations made by him in the East Room of the Executive Mansion, on the 18th of August, 1866, when he was free from any disturbing influence, and expressed himself with all the reserve of which his nature is capable.

The blasphemous utterances at St. Louis cannot be aggravated by me, nor can they be extenuated by anything which counsel for the respondent can offer. They exhibit the character of the speaker.

Upon these facts, thus proved, and the views presented, we demand the conviction of the respondent of the misdemeanors charged in the tenth article.

Article eleven sets forth that the object of the President in most of the offences alleged in the preceding articles was to prevent the execution of the act passed March 2, 1867, entitled, "An act for the more efficient government of the rebel States." It is well known, officially and publicly, that on the 29th of May, 1865, Mr. Johnson issued a proclamation for the reorganization of the government of North Carolina, and that that proclamation was followed by other proclamations, issued during the next four months, for the government of the several States which had been engaged in the rebellion. Upon the death of Mr. Lincoln Mr. Johnson entered upon the office of President in a manner which indicated that, in his judgment, he had been long destined to fill the place, and

that the powers of the office were to be exercised by him without regard to the other departments of the government. In his proclamation of the 29th of May, and in all the proclamations relating to the same subject, he had assumed that in his office as President, he was the "United States," for the purpose of deciding whether under the Constitution the government of a State was republican in form or not; although by a decision of the Supreme Court it is declared that this power is specially vested in the two houses of Congress. In these proclamations he assumed, without authority of law, to appoint, and he did appoint, governors of the several States, thus organized. In fine, between the 29th of May, 1865, and the assembling of Congress in December of that year, he exercised sovereign power over the territory and people of the eleven States that had been engaged in the rebellion.

On the assembling of Congress, in the month of December, he informed the Senate and House of Representatives that the Union was restored, and that nothing remained for the two houses but severally to accept as senators and representatives such loyal men as had been elected by the legislatures and people of the several States. Congress refused to ratify or to recognize those proceedings upon the part of the President as legal or proper proceedings, and from that time forward he has been engaged in various projects for the purpose of preventing the reconstruction of the Union on any other plan than that which he had inaugurated. In the execution of this design he attempted to deprive Congress of the confidence of the people of the country; hence it was that, among other things, on the 18th day of August, 1866, at the city of Washington, as set forth in the 10th and 11th articles, he did in a public speech declare and affirm in substance that the 39th Congress of the United States was not a Congress authorized by the Constitution to exercise legislative power under the same; but, on the contrary, was a Congress of only a part of the States.

In the further execution of his purpose to prevent the reconstruction of the Union upon any plan except that which he had inaugurated, he attempted to prevent the ratification by the several States of the amendment to the Constitution known as article fourteen. By the Constitution the President has no power to participate in amendments or in propositions for amendments thereto; yet, availing himself of the circumstance of the passage of a resolution by the House of Representatives on the 13th day of June, 1866, requesting the President to submit to the legislatures of the several States the said additional article to the Constitution of the United States, he sent to the Senate and House of Representatives a message in writing, in which he says:

> Even in ordinary times any question of amending the Constitution must be justly regarded as of paramount importance. This importance is at the present time enhanced by the fact that the joint resolution was not submitted by the two houses for the approval of the President, and that of the thirty-six States which constitute the Union, eleven are excluded from representation in either house of Congress, although, with the single exception of Texas, they have been entirely restored to all their functions as States, in conformity with the organic law of the land, and have appeared at the national capital by senators and representatives who have applied for, and have been refused, admission to the vacant seats. Nor have the sovereign people of the nation been afforded an opportunity of expressing their views upon the important questions which the amendment involves. Grave doubts, therefore, may naturally and justly arise as to whether the action of Congress is in harmony with the sentiments of the people, and whether State legislatures, elected without reference to such an issue, should be called upon by Congress to decide respecting the ratification of the proposed amendment.

He also says:

> A proper appreciation of the letter and spirit of the Constitution, as well as of the interests of national order, harmony and union, and a due deference for an enlightened public judgment, may at this time well suggest a doubt whether any amendment to the Constitution ought to be proposed by Congress and pressed upon the legislatures of the several States for final decision until after the admission of such loyal senators and representatives of the now unrepresented States as have been, or as may hereafter be, chosen in conformity with the Constitution and laws of the United States.

Digitized by Google

This message was an extra-official proceeding, inasmuch as his agency in the work of amending the Constitution is not required; and it was also a very clear indication of an opinion on his part that inasmuch as the eleven States were not represented, the Congress of the United States had no power to act in the matter of amending the Constitution.

The proposed amendment to the Constitution contained provisions which were to be made the basis of reconstruction. The laws subsequently passed by Congress recognize the amendment as essential to the welfare and safety of the Union. It is alleged in the eleventh article that one of the purposes of the President in the various unlawful acts charged in the several articles of impeachment, and proved against him, was to prevent the execution of the act entitled "An act for the more efficient government of the rebel States," passed March 2, 1867. In the nature of the case it has not been easy to obtain testimony upon this point, nor upon any other point touching the misconduct and crimes of the President. His declarations and his usurpations of power have rendered a large portion of the officeholders of the country for the time being subservient to his purposes; they have been ready to conceal and reluctant to communicate any evidence calculated to implicate the President. His communications with the South have been generally, and it may be said almost exclusively, with the men who had participated in the rebellion, and who are now hoping for final success through his aid. They have looked to him as their leader, by whose efforts and agency in the office of President of the United States they were either to accomplish the objects for which the war was undertaken, or at least to secure a restoration to the Union under such circumstances that, as a section of the country and an interest in the country, they should possess and exercise that power which the slaveholders of the South possessed and exercised previous to the rebellion. These men have been bound to him by the strong bonds of hope, fear, and ambition. The corruptions of the public service have enriched multitudes of his adherents and quickened and strengthened the passion of avarice in multitudes more. These classes of men, possessing wealth and influence in many cases, have exerted their power to close up every avenue of information. Hence the efforts of the committees of the House of Representatives and the efforts of the managers to ascertain the truth and to procure testimony which they were satisfied was in existence, have been defeated often by the devices and machinations of those who in the North and in the South are supposed to be allied to the President. There can, however, be no doubt that the President in every way open to him used his personal and official influence to defeat the ratification of the constitutional amendment. Evidence of such disposition and of the fact also is found in the telegraphic correspondence of January, 1867, between Mr. Johnson and Lewis E. Parsons, who had been previously appointed governor of Alabama by the President. It is as follows:

MONTGOMERY, ALABAMA, *January* 17, 1867.

Legislature in session. Efforts making to reconsider vote on constitutional amendment. Report from Washington says it is probable an enabling act will pass. We do not know what to believe. I find nothing here.

LEWIS E. PARSONS, *Exchange Hotel.*

His Excellency ANDREW JOHNSON, *President.*

UNITED STATES MILITARY TELEGRAPH, EXECUTIVE OFFICE,
Washington, D. C., January 17, 1867.

What possible good can be obtained by reconsidering the constitutional amendment? I know of none in the present posture of affairs; and I do not believe the people of the whole country will sustain any set of individuals in attempts to change the whole character of our government by enabling acts or otherwise. I believe, on the contrary, that they will eventually uphold all who have patriotism and courage to stand by the Constitution and who place their confidence in the people. There should be no faltering on the part of those who are honest in their determination to sustain the several coördinate departments of the government in accordance with its original design.

ANDREW JOHNSON.

Hon. LEWIS E. PARSONS, *Montgomery, Alabama.*

Google

This correspondence shows his fixed purpose to defeat the congressional plan of reconstruction. Pursuing the subject further it is easy to discover and comprehend his entire scheme of criminal ambition. It was no less than this: To obtain command of the War Department and of the army, and by their combined power to control the elections of 1868 in the ten States not yet restored to the Union. The congressional plan of reconstruction contained as an essential condition the extension of the elective franchise to all loyal male citizens, and the exclusion from the franchise of a portion of those who had been most active in originating and carrying on the rebellion. The purpose of Mr. Johnson was to limit the elective franchise to white male citizens, and to permit the exercise of it by all such persons without regard to their disloyalty. If he could secure the control of the War Department and of the army it would be entirely practicable, and not only practicable but easy for him in the coming elections quietly to inaugurate a policy throughout the ten States by which the former rebels, strengthened by the support of the Executive here, and by the military forces distributed over the South, would exclude from the polls every colored man, and to permit the exercise of the elective franchise by every white rebel. By these means he would be able to control the entire vote of the ten rebel States; by the same means, or indeed by the force of the facts, he would be able to secure the election of delegates to the democratic national convention favorable to his own nomination to the presidency. The vote of these ten States in the convention, considered in connection with the fact that he and his friends could assure delegates from other sections of the country that, if he were nominated, he could control beyond peradventure the electoral vote of these ten States, would have secured his nomination. This he confidently anticipated. Nor, indeed, can there be much doubt that this scheme, would have been successful; but it was apparent that there was no possibility of his obtaining the control of the War Department and of the army unless he could disregard and break down the act regulating the tenure of certain civil offices, passed March 2, 1867. If, however, he could annul, or disregard or set aside the provisions of that act, then the way was open for the successful consummation of his plan. With thousands and tens of thousands of office-holders, scattered all over the country, depending upon him for their offices and for the emoluments of their offices, he would be able to exert a large influence, if not absolutely to control the nominations of the democratic party in every State of the Union. With the War Department in his hands and the tenure-of-office act broken down, he would be able to remove General Grant, General Sherman, General Sheridan, or any other officer, high or low, who, in his opinion, or upon the facts, might be an obstacle in his way. With the army thus corrupted and humiliated, its trusted leaders either driven from the service or sent into exile in distant parts of the country, he would be able to wield the power of that vast organization for his own personal advantage.

Under these circumstances it was not probable merely, but it was as certain as anything in the future could be, that he would secure, first, the nomination of the democratic party in the national nominating convention, and, secondly, that he would secure the electoral votes of these ten States. This being done, he had only to obtain enough votes from the States now represented in Congress to make a majority of electoral votes, and he would defy the House and Senate should they attempt to reject the votes of the ten States, and this whether those States had been previously restored to the Union or not. In a contest with the two houses he and his friends and supporters, including the War Department, the Treasury Department, and the army and navy, would insist that he had been duly elected President, and by the support of the War Department, the Treasury Department, the army and the navy, he would have been inaugurated on the 4th of March next President of the United States for four years.

That the President was and is hostile to Mr. Stanton, and that he desired

his removal from office, there is no doubt; but he has not assumed the responsibility which now rests upon him, he has not incurred the hazard of his present position, for the mere purpose of gratifying his personal feelings towards Mr. Stanton. He disregarded the tenure-of-office act; he first suspended and then removed Mr. Stanton from the office of Secretary for the Department of War; he defied the judgment of and the advice and authority of the Senate; he incurred the risk of impeachment by the House of Representatives, and trial and conviction by this tribunal, under the influence of an ambition unlimited and unscrupulous, which dares anything and everything necessary to its gratification. For the purpose of defeating the congressional plan of reconstruction, he has advised and encouraged the people of the South in the idea that he would restore them to their former privileges and power; that he would establish a white man's government; that he would exclude the negroes from all participation in political affairs; and, finally, that he would accomplish in their behalf what they had sought by rebellion, but by rebellion had failed to secure. Hence, it is through his agency and by his influence the South has been given up to disorder, rapine, and bloodshed; hence it is that since the surrender of Lee and Johnston thousands of loyal men, black and white, have been murdered in cold blood or subjected to cruelties and tortures such as in modern times have been perpetrated only by savage nations and in remote parts of the world; hence it is that 12,000,000 of people are without law, without order, unprotected in their industry or their rights; hence it is that ten States are without government and unrepresented in Congress; hence it is that the people of the North are even now uncertain whether the rebellion, vanquished in the field, is not finally to be victorious in the councils and in the cabinet of the country; hence it is that the loyal people of the entire Union look upon Andrew Johnson as their worst enemy; hence it is that those who participated in the rebellion, and still hope that its power may once more be established in the country, look upon Andrew Johnson as their best friend, and as the last and chief supporter of the views which they entertain.

The House of Representatives has brought this respondent to your bar for trial, for conviction, and for judgment; but the House of Representatives, as a branch of the legislative department of the government, has no special interest in these proceedings. It entered upon them with great reluctance, after laborious and continued investigation, and only upon a conviction that the interests of the country were in peril, and that there was no way of relief except through the exercise of the highest constitutional power vested in that body. We do not appeal to this tribunal because any special right of the House of Representatives has been infringed, or because the just powers of or the existence of the House are in danger, except as that body must always participate in the good or ill fortune of the country. They have brought this respondent to your bar, and here demand his conviction in the belief, as the result of much investigation, of much deliberation, that the interests of this country are no longer safe in his hands.

But the House of Representatives, representing the people of the country, may very properly appeal to this tribunal, constituted, as it is, exclusively of senators representing the different States of this Union, to maintain the constitutional powers of the Senate. To be sure, nothing can injuriously affect the powers and the rights of the Senate which does not affect injuriously the rights of the House of Representatives and of the people of the whole country; but it may be said with great truth, that this contest is first for the preservation of the constitutional powers of this branch of the government. By your votes and action in concurrence with the House of Representatives, the bill "regulating the tenure of certain civil offices" was passed, and became a law, and this notwithstanding the objections of the President thereto, and his argument against its passage. On a subsequent occasion, when you considered the suspension of

Mr. Stanton and the message of the President, in which by argument and by statements he assailed the law in question, you asserted its validity and its constitutionality, by refusing to concur in the suspension of Mr. Stanton. On a more recent occasion, when he attempted to remove Mr. Stanton from office, you, by solemn resolution, declared that his action therein was contrary to the laws and to the Constitution of the country.

From the beginning of the government this body has participated under the Constitution, and by virtue of the Constitution, in all matters pertaining to appointments to office; and, by the universal practice of the country, as well before the passage of the tenure-of-office act as since, no removal of any officer whose appointment was, by and with the advice and consent of the Senate, has been made during a session of the Senate, with your knowledge and sanction, except by the nomination of a successor, whose nomination was confirmed by and with the advice and consent of the Senate. Mr. Johnson, in presence of this uniform constitutional practice of three-quarters of a century, and against the express provisions of the tenure-of-office act, made in this particular, in entire harmony with that practice, asserts now, absolutely, the unqualified power to remove every officer in the country, without the advice or consent of the Senate.

Never in the history of any free government has there been so base, so gross, so unjustifiable an attempt upon the part of any executive, whether Emperor, King or President, to destroy the just authority of another department of the government.

The House of Representatives has not been indifferent to this assault; it has not been unmindful of the danger to which you have been exposed; it has seen, what you must admit, that without its agency and support you were powerless to resist these aggressions, or to thwart, in any degree, the purposes of this usurper. In the exercise of their constitutional power of impeachment they have brought him to your bar; they have laid before you the evidence showing conclusively the nature, the extent, and the depth of his guilt. You hold this great power in trust, not for yourselves merely, but for all your successors in these high places, and for all the people of this country. You cannot fail to discharge your duty; that duty is clear. On the one hand it is your duty to protect, to preserve, and to defend your own constitutional rights, but it is equally your duty to preserve the laws and institutions of the country. It is your duty to protect and defend the Constitution of the United States, and the rights of the people under it; it is your duty to preserve and to transmit unimpaired to your successors in these places all the constitutional rights and privileges guaranteed to this body by the form of government under which we live. On the other hand it is your duty to try, and convict the accused, if guilty, and to pronounce judgment upon the respondent, that all his successors, and all men who aspire to the office of President, in time to come, may understand that the House of Representatives and the Senate will demand the strictest observance of the Constitution; that they will hold every man in the presidential office responsible for a rigid performance of his public duties.

Nothing, literally nothing, can be said in defence of this respondent. Upon his own admissions he is guilty in substance of the gravest charges contained in the articles of impeachment exhibited against him by the House of Representatives. In his personal conduct and character he presents no quality or attribute which enlists the sympathy or the regard of men. The exhibition which he made in this chamber on the 4th of March, 1865, by which the nation was humiliated and republican institutions disgraced, in the presence of the representatives of the civilized nations of the earth, is a truthful exhibition of his character. His violent, denunciatory, blasphemous declarations made to the people on various occasions, and proved by the testimony submitted to the Senate, illustrate other qualities of his nature. His cold indifference to the desolation, disorder, and crimes in the ten States of the South exhibit yet other and darker features.

Can any one entertain the opinion that Mr. Johnson is not guilty of such crimes as justify his removal from office and his disqualification to hold any office of trust or profit under the government of the United States? William Blount, senator of the United States, was impeached by the House of Representatives and declared guilty of a high misdemeanor, and though not tried by the Senate, the Senate did, nevertheless, expel him from his seat by a vote of twenty-five to one, and in the resolution of expulsion declared that he had been guilty of a high misdemeanor. The crime of William Blount was that he wrote a letter and participated in conversations, from which it appeared probable that he was engaged in an immature scheme to alienate the Indians of the southwest from the President and the Congress of the United States; and also, incidentally, to disturb the friendly relations between this government and the governments of Spain and Great Britain. This, at most, was but an arrangement, never consummated into any overt act, by which he contemplated, under possible circumstances which never occurred, that he would violate the neutrality laws of the United States.

Andrew Johnson is guilty, upon the proof in part and upon his own admissions, of having intentionally violated a public law, of usurping and exercising powers not exercised nor even asserted by any of his predecessors in office.

Judge Pickering, of the district court of New Hampshire, was impeached by the House of Representatives, convicted by the Senate, and removed from office, for the crime of having appeared upon the bench in a state of intoxication. I need not draw any parallel between Judge Pickering and this respondent.

Judge Prescott, of Massachusetts, was impeached and removed from office for receiving illegal fees in his office to the amount of $10 70 only. Judge Prescott belonged to one of the oldest and most eminent families of the State, and he was himself a distinguished lawyer. But such was the respect of the Senate of that State for the law, and such the public opinion that it was the duty of magistrates to obey the law, that they did not hesitate to convict him and remove him from office.

The Earl of Macclesfield was impeached and convicted for the misuse of his official powers in regard to trust funds, an offence in itself of a grave character, but a trivial crime compared with the open, wanton, and defiant violation of law by a Chief Magistrate whose highest duty is the execution of the laws.

If the charges preferred against Warren Hastings had been fully sustained by the testimony, he would be regarded in history as an unimportant criminal when compared with the respondent. Warren Hastings, as governor general of Bengal, extended the territory of the British empire, and brought millions of the natives of India under British rule. If he exercised power in India for which there was no authority in British laws or British customs—if in the exercise of that power he acquired wealth for himself or permitted others to accumulate fortunes by outrages and wrongs perpetrated upon that distant people, he still acted in his public policy in the interest of the British empire and in harmony with the ideas and purposes of the British people.

Andrew Johnson has disregarded and violated the laws and Constitution of his own country. Under his administration the government has not been strengthened, but weakened. Its reputation and influence at home and abroad have been injured and diminished. He has not outraged a distant people bound to us by no ties but those which result from conquest and the exercise of arbitrary power on our part; but through his violation of the laws and the influence of his evil example upon the men of the south in whose hearts the purposes and the passions of the war yet linger, he has brought disorder, confusion, and bloodshed to the homes of twelve million of people, many of whom are of our own blood and all of whom are our countrymen. Ten States of this Union are without law, without security, without safety; public order everywhere violated, public justice nowhere respected; and all in consequence of the evil purposes

Digitized by Google

and machinations of the President. Forty million of people have been rendered anxious and uncertain as to the preservation of public peace and the perpetuity of the institutions of freedom in this country.

There are no limits to the consequences of this man's evil example. A member of his cabinet in your presence avows, proclaims indeed, that he suspended from office indefinitely a faithful public officer who was appointed by your advice and consent; an act which he does not attempt to justify by any law or usage, except what he is pleased to call the law of necessity. Is it strange that in the presence of these examples the ignorant, the vicious, and the criminal are everywhere swift to violate the laws? Is it strange that the loyal people of the south, most of them poor, dependent, not yet confident of their newly acquired rights, exercising their just privileges in fear and trembling, should thus be made the victims of the worst passions of men who have freed themselves from all the restraints of civil government? Under the influence of these examples good men in the south have everything to fear, and bad men have everything to hope.

Caius Verres is the great political criminal of history. For two years he was prætor and the scourge of Sicily. The area of that country does not much exceed ten thousand square miles, and in modern times it has had a population of about two million souls. The respondent at your bar has been the scourge of a country many times the area of Sicily, and containing a population six times as great. Verres enriched himself and his friends; he seized the public paintings and statues and carried them to Rome. But at the end of his brief rule of two years he left Sicily as he had found it; in comparative peace, and in the possession of its industries and its laws. This respondent has not ravaged States nor enriched himself by the plunder of their treasures; but he has inaugurated and adhered to a policy which has deprived the people of the blessings of peace, of the protection of law, of the just rewards of honest industry. A vast and important portion of the republic, a portion whose prosperity is essential to the prosperity of the country at large, is prostrate and helpless under the evils which his administration has brought upon it. When Verres was arraigned before his judges at Rome, and the exposure of his crimes began, his counsel abandoned his cause and the criminal fled from the city. Yet Verres had friends in Sicily, and they erected a gilded statue to his name in the streets of Syracuse. This respondent will look in vain, even in the south, for any testimonials to his virtues or to his public conduct. All classes are oppressed by the private and public calamities which he has brought upon them. They appeal to you for relief. The nation waits in anxiety for the conclusion of these proceedings. Forty millions of people, whose interest in public affairs is in the wise and just administration of the laws, look to this tribunal as a sure defence against the encroachments of a criminally minded Chief Magistrate.

Will any one say that the heaviest judgment which you can render is any adequate punishment for these crimes? Your office is not punishment, but to secure the safety of the republic. But human tribunals are inadequate to punish those criminals, who, as rulers or magistrates, by their example, conduct, policy, and crimes, become the scourge of communities and nations. No picture, no power of the imagination, can illustrate or conceive the suffering of the poor but loyal people of the south. A patriotic, virtuous, law-abiding chief magistrate would have healed the wounds of war, soothed private and public sorrows, protected the weak, encouraged the strong, and lifted from the southern people the burdens which now are greater than they can bear.

Travellers and astronomers inform us that in the southern heavens, near the southern cross, there is a vast space which the uneducated call the hole in the sky, where the eye of man, with the aid of the powers of the telescope, has been unable to discover nebulæ, or asteroid, or comet, or planet, or star, or sun. In that dreary, cold, dark region of space, which is only known to be less than

infinite by the evidences of creation elsewhere, the Great Author of celestial mechanism has left the chaos which was in the beginning. If this earth were capable of the sentiments and emotions of justice and virtue, which in human mortal beings are the evidences and the pledge of our Divine origin and immortal destiny, it would heave and throw, with the energy of the elemental forces of nature, and project this enemy of two races of men into that vast region, there forever to exist in a solitude eternal as life, or as the absence of life, emblematical of, if not really, that "outer darkness" of which the Saviour of man spoke in warning to those who are the enemies of themselves, of their race, and of their God. But it is yours to relieve, not to punish. This done and our country is again advanced in the intelligent opinion of mankind. In other governments an unfaithful ruler can be removed only by revolution, violence, or force. The proceeding here is judicial, and according to the forms of law. Your judgment will be enforced without the aid of a policeman or a soldier. What other evidence will be needed of the value of republican institutions? What other test of the strength and vigor of our government? What other assurance that the virtue of the people is equal to any emergency of national life?

The contest which the House of Representatives carries on at your bar is a contest in defence of the constitutional rights of the Congress of the United States, representing the people of the United States, against the arbitrary, unjust, illegal claims of the Executive.

This is the old contest of Europe revived in America. England, France, and Spain have each been the theatre of this strife. In France and Spain the Executive triumphed. In England the people were victorious. The people of France gradually but slowly regain their rights. But even yet there is no freedom of the press in France; there is no freedom of the legislative will; the Emperor is supreme.

Spain is wholly unregenerated. England alone has a free parliament and a government of laws emanating from the enfranchised people. These laws are everywhere executed, and a sovereign who should wilfully interpose any obstacle would be dethroned without delay. In England the law is more mighty than the king. In America a President claims to be mightier than the law.

This result in England was reached by slow movements, and after a struggle which lasted through many centuries. John Hampden was not the first nor the last of the patriots who resisted executive usurpation, but nothing could have been more inapplicable to the present circumstances than the introduction of his name as an apology for the usurpations of Andrew Johnson.

"No man will question John Hampden's patriotism or the propriety of his acts when he brought the question whether ship-money was within the Constitution of England, before the courts;" but no man will admit that there is any parallel between Andrew Johnson and John Hampden. Andrew Johnson takes the place of Charles I, and seeks to substitute his own will for the laws of the land. In 1636 John Hampden resisted the demands of an usurping and unprincipled king, as does Edwin M. Stanton to-day resist the claims and demands of an unprincipled and usurping President.

The people of England have successfully resisted executive encroachment upon their rights. Let not their example be lost upon us. We suppressed the rebellion in arms, and we are now to expel it from the executive councils. This done republican institutions need no further illustration or defence. All things then relating to the national welfare and life are made as secure as can be any future events.

The freedom, prosperity, and power of America are established. The friends of constitutional liberty throughout Europe will hail with joy the assured greatness and glory of the new republic. Our internal difficulties will rapidly disappear. Peace and prosperity will return to every portion of the country. In a

few weeks or months we shall celebrate a restored Union upon the basis of the equal rights of the States, in each of which equality of the people will be recognized and established. This respondent is not to be convicted that these things may come, but justice being done these things are to come.

At your bar the House of Representatives demands justice—justice for the people, justice to the accused. Justice is of God, and it cannot perish. By and through justice comes obedience to the law by all magistrates and people. By and through justice comes the liberty of the law, which is freedom without license.

Senators, as far as I am concerned, the case is now in your hands, and it is soon to be closed by my associate. The House of Representatives have presented this criminal at your bar with equal confidence in his guilt and in your disposition to administer exact justice between him and the people of the United States.

His conviction is the triumph of law, of order, of justice. I do not contemplate his acquittal—it is impossible. Therefore I do not look beyond. But, senators, the people of America will never permit an usurping executive to break down the securities for liberty provided by the Constitution. The cause of the republic is in your hands. Your verdict of *guilty* is *peace* to our beloved country.

Mr. JOHNSON. Mr. Chief Justice, I understand from the counsel for the President who is next to address the Senate that he would be very much obliged to the Senate if they would take their usual recess now, he being anxious to make a continuing argument. I move, therefore, that the court take a recess for fifteen minutes.

The motion was agreed to; and, at the expiration of the recess, the Chief Justice resumed the chair.

Hon. THOMAS A. R. NELSON, counsel for the respondent, addressed the Senate as follows:

Mr. CHIEF JUSTICE AND SENATORS: I have been engaged in the practice of my profession as a lawyer for the last thirty years. I have been concerned in every variety of cause which can be tried under the laws of the State in which I reside. I have, in the course of my somewhat lengthy professional life, argued cases involving life, liberty, property, and character. I have prosecuted and defended every species of criminal cause, from murder in the first degree down to a simple assault. But in rising to address you to-day I feel that all the causes in which I ever was concerned sink into comparative insignificance when compared with this; and a painful sense of the magnitude of the case in which I am now engaged, and of my inability to meet and to defend it as it should be defended, oppresses me as I rise to address you; and I would humbly invoke the great Disposer of events to give me a mind to conceive, a heart to feel, and a tongue to express those words which should be properly and fitly expressed on this great occasion. I would humbly invoke that assistance which comes from on high; for when I look at the results which may follow from this trial; when I endeavor to contemplate in imagination how it is to affect our country and the world, I start back, feeling that I am utterly incapable of comprehending its results, and that I cannot look into the future and foretell them.

I feel, senators, that it will be necessary upon this occasion for me to notice many things which, as I suppose, have but little bearing upon the specific articles of impeachment which have been presented. In doing so, to borrow the language of Mr. Wirt upon the trial of Judge Peck, "if we pursue the opening arguments of the honorable managers more closely than may seem necessary to some of the court, it will be remembered that it would be presumptuous in us to slight any topic which the learned and honorable managers may have deemed it important to press on the consideration of the court."

It has been charged that the President was "trifling" with the Senate. Scarcely had we entered upon this trial before charges were made against him

of seeking, and improperly seeking, to gain time; to effect an unworthy and improper procrastination. I shall dwell but a moment on that. We supposed that there was no impropriety in our asking at the hands of the Senate a reasonable indulgence to prepare for our defence, when the subject of impeachment had been before the House of Representatives in some form or other for more than a twelvemonth, and when the worthy and able managers who have been selected to conduct it in this Senate were armed at all points and ready to contest the cause on the one hand, and we, upon the other, were suddenly summoned from our professional pursuits; we, who are not politicians, but lawyers engaged in the practice of our profession, were summoned here to measure arms with gentlemen who are skilled in political gladiation and are well posted upon all the subjects that may be involved in this investigation.

But it is not merely the complaint as to time and as to trifling with the Senate that it will become my duty to notice. A great many things have been said, senators, and among the rest an effort has been made to draw "a picture of the President's mind and heart;" he has been stigmatized as a "usurper," as a "traitor to his party," as "disgracing the position held by some of the most illustrious in the land," as "a dangerous person, a criminal, but not an ordinary one," as "encouraging murders, assassinations, and robberies all over the southern States;" and finally, by way of proving that there is one step between the sublime and the ridiculous, he has been charged with being "a common scold," and a "ribald, scurrilous blasphemer, bandying epithets and taunts with a jeering mob"

Such are some of the many accusations which have been made here from time to time in the progress of this protracted investigation. Nothing or next to nothing has been said in vindication of the President against these charges. It will be my duty, senators, to pay some attention to them to-day. We have borne it long enough, and I propose, before I enter upon the investigation of the articles of impeachment, to pay some attention to these accusations which have been heaped upon us almost every day from the commencement of the trial, and which have hitherto passed unanswered and unnoticed on the side of the President of the United States.

If it be true, as alleged, that the President is guilty of all these things, or if he has been guilty of one tithe of the offences which have been imputed to him in the opening argument, and which have been iterated and reiterated in the argument of to-day, then I am willing to confess that he is

> "A monster of such frightful mien
> As to be hated needs but to be seen."

I am willing to admit that if he is guilty of any of the charges which have been made against him he is not only worthy of the censure of this Senate, but a whip should be put in every honest hand to lash him around the world as a man unworthy of the notice of gentlemen and unfit for the association of any of his race; he should be pointed at everywhere and shown as a monster; he should be banished from society; his very name should become a word to frighten children with throughout the land from one end of it to the other, so that when one should meet him his sight would cause—

> "Each particular hair to stand on end
> Like quills upon the fretful porcupine."

If he be a man such as is represented on the other side, then, senators, we agree that neither I, nor any of those who are associated with me, can defend him.

But who is Andrew Johnson? Who is the man that you have upon trial now, and in regard to whom the gaze not of little Delaware, but of the whole Union and of the civilized world is directed at the present moment? Who is Andrew Johnson? That is a question which a few years ago many of those whom I now address

Digitized by Google

could have answered, and could have answered with pleasure and delight and joy. Who is Andrew Johnson? Go to the town of Greenville but a few short years ago, a little village situate in the mountains of East Tennessee, and you will see a poor boy entering that village a stranger, without friends, without acquaintances, following an humble mechanical pursuit, scarcely able to read, unable to write, but yet industrious in his calling, honest and faithful in his dealings, and having a mind such as the God of heaven had implanted within him, and which it was intended and designed should be called into exercise and displayed before the American people. He goes there, and I may say almost, in the language of Mr. Clay in reference to the State of Kentucky, he enters the State of Tennessee an orphan, poor, penniless, without the favor of the great; "but scarce had he set his foot upon her generous soil when he was seized and embraced with parental fondness, caressed as though he had been a favorite child, and patronized with liberal and unbounded munificence." In the first instance he applies to the people of his county to honor him by giving him a seat in the lower branch of the State legislature. That wish is granted. Next he is sent to the State senate; then to the House of Representatives of the American Congress; then, by the voice of the people in two hard-fought contests, he was elected governor of the State; then he was sent to the Senate of the United States, and his whole career thus far was a career in which he had been honored and respected by the people, and it has only been within some two or three years that charges have been preferred against him such as those which are presented now.

Never since the days of Warren Hastings, ay, never since the days of Sir Walter Raleigh, has any man been stigmatized with more severe reprobation than the President of the United States. All the powers of invective which the able and ingenious managers can command have been brought into requisition to fire your hearts and to prejudice your minds against him. A perfect storm has been raised around him. All the elements have been agitated.

"Far along,
From peak to peak the rattling crags among
Leaps the live thunder! Not from one lone cloud,
But every mountain now hath found a tongue,
And Jura answers through her misty shroud,
Back to the joyous Alps, who call to her aloud!"

The storm is playing around him; the pitiless rain is beating upon him; the lightnings are flashing around him; but I have the pleasure to state to you, senators, to-day, and I hope that my voice will reach the whole country, that in the midst of it all he still stands firm, serene, unbent, unbroken, unsubdued, unawed, unterrified, hurling no words of threat or menace at the Senate of the United States, threatening no civil war to deluge his country with blood; but feeling a proud consciousness of his own integrity, appealing to heaven to witness the purity of his motives in his public administration, and calling upon you, senators, in the name of the living God, to whom you have made an appeal, that you will do equal and impartial justice in this case according to the Constitution and the laws, to pronounce him innocent of the offences which have been charged against him.

Who is Andrew Johnson? Are there not senators here who are well acquainted with him? Are there not men here whose minds go back to the stirring times of 1860 and 1861, when treason was rife in this Capitol, when men's faces turned pale, when despatch after despatch was sent from this chamber and from the House of Representatives to the people of the southern States to "fire the southern heart," to prepare the southern mind for that revolution which agitated our country and which cost the lives and the treasure of the nation to such an alarming extent? Where was Andrew Johnson then? Standing here, almost within ten feet of the place in which I stand now, solitary and

Digitized by Google

alone, in this magnificent chamber, when "bloody treason flourished over us," his voice was heard arousing the nation. Some of you heard it. I only heard its echoes as they rolled along from one end of the land to the other, to excite and arouse the patriotism of our common country. Yes, he stood "solitary and alone," the only member from the south who was disposed to battle against treason then; and he now is called a traitor himself! He who has periled his life in a thousand forms to put down treason; he who has been reckless of danger; he who has periled his life, his fortune, and his sacred honor to save this land from destruction and ruin—he now is stigmatized and denounced as a traitor; and from one end of the country to the other that accusation is made, and it rings and rings again until the echoes even come back to the Capitol, and are intended, if possible, to influence the judgment of senators!

Who is Andrew Johnson? Not a man who is disposed to betray any trust that had been reposed in him; but a man who, whenever he has been before the people who knew him best, has upon all occasions been sustained—sustained by his neighbors, sustained by his State, sustained by his country—and who on all occasions has shown himself worthy of the high confidence and trust that have been reposed in him.

I know, senators, that when I state these things in your presence and in your hearing they may excite a smile of derision among some of those who differ with him in opinion. I know that an unfortunate difference of opinion exists between the Congress of the United States and the President, and I feel, in attempting to address you in his behalf upon some of the very questions about which this difference exists, that, in the language of Mr. Adams, I am walking in the midst of burning ploughshares; but I pray Almighty God to direct me and to lead me aright, for I believe in His presence this day that my distinguished client is innocent of the charges that are preferred against him; and I hope that God's blessing, that has followed him thus far in life, will follow him now, and that he will at the end of this trial come out of the fiery furnace through which he is passing without the smell of fire upon his garments.

Who is Andrew Johnson? Why, senators, when the battle of Manassas, as we called it in the south, or of Bull Run, as I believe it is called in the north, was fought, when our troops were defeated, when they rushed in hot haste and awful confusion to this capital, when men's faces turned pale and their hearts grew faint, where was Andrew Johnson then, this traitor, this usurper, this tyrant? Again he was heard in his place in the Senate, and he rises with a resolution in his hand, undismayed, unfaltering, believing in the justice of the great cause in which the country was engaged, and once more his voice was heard proclaiming to the whole land and to all the world the objects and purposes of the war and the determination of the Congress of the United States, in the fear of God and in the confidence of the justice of their cause, to pursue it to an honorable and a safe conclusion. Then it was that his voice was heard, and again the plaudits of hundreds and thousands shook the very walls of this Capitol in his favor, as they had done on former occasions when he stood here and vindicated the American Constitution and proclaimed the determination of the government to uphold and to maintain it.

One word more, senators, in regard to the President of the United States. It is admitted upon all hands that we are addressing gentlemen of the highest intelligence and position in the land, many of whom, as has been repeatedly said, are judges and lawyers well skilled in the law. What has been your rule of conduct either as judges or lawyers when you came to pronounce judgment upon the conduct of a fellow-man? You endeavored to place yourselves in his position; you endeavored to look at things from his stand-point; you endeavored to judge of them as he judged of them; and when you thus act you are enabled understandingly to determine whether the particular act in question be right or wrong. I only ask you here to-day, if it be possible for you to do so,

Digitized by Google

to place yourselves in Andrew Johnson's position, and to look from his standpoint, and judge in the manner in which he judged. I know, senators, that this is asking a great deal at your hands. I know it is asking a great deal of men who have fixed opinions upon subjects like these to review their own opinions and to consider them, especially where they are different from those of the man whose conduct they are endeavoring to judge. But I feel, when I am addressing you here to-day, that I am not addressing a Senate such as the honorable managers spoke of the other day. I am not addressing mere politicians. I feel that I am addressing judges—the most eminent judges known to the laws and the Constitution of our country—judges sitting upon the greatest trial known to the Constitution; judges who have prescribed an oath for themselves; and while I know, while we all feel, the power of passion and of prejudice and preconceived opinion, and know the difficulty of laying them aside, yet, senators, I would humbly and respectfully invoke you this day, in the name of that God to whom you have appealed, to make one honest, faithful effort to banish from your mind, as far as possible, all preconceived opinions; to sink the politician in the judge; to rise to the dignity and majesty of this great occasion; and, though it be like cutting off a right arm or plucking out a right eye, I ask you, senators, to rise to that superhuman, God-like effort which shall enable you to banish these opinions and to do that equal and impartial justice which you have sworn to do.

Some people think that this cannot be done. It is impossible to close our eyes against what is taking place out of doors. It is impossible not to know that the newspapers have discussed this case. The press of this country is now the most tremendous power that belongs to it, a power greater than the power of Presidents and senators and representatives, the mightiest power known to the land. It is impossible for us to close our eyes against the fact that this case has been discussed and discussed over and over again in every form by those who favor impeachment and by those who are opposed to it, and all manner of opinions have been expressed. Some have said that they can calculate just exactly what is to be the result of this trial. Senators, I have made no such calculation. I declare to you here most solemnly, I declare to this country most solemnly, that I make no such calculation. No such unworthy investigation has for a moment agitated my mind. No, senators, I would not do a thing so unworthy of the lofty position which you hold in the land. I say to you, and I say to the whole country, that whatever others may think, whatever they may believe, I for one do not believe that impeachment is a foregone conclusion. If I thought so, humble as I am, and exalted as you are, I would scorn the idea of addressing myself to this honorable court; but I do not believe it. No, sirs, no; nothing but a result which I trust in God never will happen will bring me to the conclusion that any such state of things exists with honorable men, representatives of the sovereignty of the States; for, senators, we all know enough about the history of our country to know that it requires no ordinary talent, no ordinary character, no ordinary experience to get to this chamber in which you are acting as the representatives of the States. It requires standing, character, age, talent to enable men to come here and to occupy the positions that you now occupy; and, for the honor of our common country, for the honor of American senators, for the honor of our noble ancestors who framed this tribunal with a view to do equal and impartial justice, I cannot for one moment credit such things. I would say now, as I have seen it said on some few occasions—I would say now as ever to the American people, place no confidence in these things; believe that the senators of the American nation are all honest and honorable men; and in every time of trial and of danger, when the billows of excitement roll high, when human passions are aroused and agitated in the highest degree, look to the Senate; look with hope and with confidence; look to those men who are in some degree elevated above dependence upon mere

Digitized by Google

popular clamor and hasty and temporary excitement; look to the Senate; look to it with confidence; and thus looking, your hope shall not be in vain.

Thus it is, senators, that I shall endeavor to address you on this occasion. It is with this hope and with this confidence that I approach the consideration of some of the other topics which have been raised in this cause. I asked you a moment ago, if possible, to place yourselves in the condition of the President of the United States, to divest yourselves, so far as you can, of all preconceived opinions—and I admitted that it is an almost superhuman effort to do so—and to place yourselves, as far as you can, in his position, to look at his acts in the manner in which he looked at them. And now trace the history of his life in another view, his life as a politician.

Who is the President of the United States? A democrat of the straightest of strict constructionists; an old Jacksonian, Jeffersonian democrat; a man who proclaimed his democracy in the very letter of acceptance which he wrote at the time when he was nominated for the Vice-Presidency; a man who told you and who told the whole country in that letter that he was a democrat, and who endeavored to arouse the old democracy to what he called the pure and correct democracy of the country, to rally around the national flag and to sustain the country in the great conflict through which it was passing. Now, when you look at this, and when you consider all the public speeches that he ever made, examine the records of Congress, examine your debates everywhere, look to any question in which an inquiry into the Constitution of the United States was ever involved, where do you find the President? You find him under all circumstances a strict constructionist of the Constitution, adhering with tenacity to the principles of that party faith in which he had been trained and educated; and when you look at the great difference of opinion that exists between him and yourselves, and him and the House of Representatives upon the great questions that are agitating the country, while you may differ from him in opinion, while you do differ with him in opinion, yet, senators, I ask you if he may not honestly entertain an opinion different from yours? Do accord to him something of those motives that you accord to every other human being upon a trial; accord to him at least what the laws of the land grant to the meanest criminal who ever was arraigned at the bar of justice; accord to him the benefit of the legal presumption that he shall be presumed innocent until the contrary appears. Look at his motives; look at the manner in which he has acted; and if there has been, as there is, an unfortunate difference of opinion between him and the Congress of the United States upon great constitutional questions, why, senators, attribute the difference, if you please, to the training, to the education, to the habits of thought of his whole life; but do not, in the absence of proof, attribute it to unworthy, base, mean, dishonorable motives, as you are asked to do on the other side.

I beg leave, senators, to remind you of the resolution to which I adverted a few moments ago; for, in the view which I take of this case, that resolution furnishes a key to the whole conduct of the President in the controversy out of which this unfortunate prosecution has arisen. How was that resolution of 1861? It is familiar to you all:

Resolved, That the present deplorable civil war has been forced upon the country by the disunionists of the southern States now in revolt against the constitutional government and in arms around the capital; that in this national emergency Congress, banishing all feeling of mere passion or resentment, will recollect only its duty to the whole country; that this war is not prosecuted on our part in any spirit of oppression, nor for any purpose of conquest or subjugation, nor for the purpose of overthrowing the rights or established institutions of those States, but to defend and maintain the supremacy of the Constitution and all laws made in pursuance thereof, and to preserve the Union with all the dignity, equality, and rights of the several States unimpaired; that as soon as these objects are accomplished the war ought to cease.

There is the chart that has guided the President of the United States in the discharge of his official duty; there is the platform on which he has stood; and

if he has not viewed it in the light in which others regarded it, still, senators, we ask you if it is not capable of being regarded in the light in which he viewed it? If it is, then, as I shall maintain, we deprive this prosecution of all improper motive. I declare here to you to-day that in view of all the testimony which has been offered on the other side, in view of all that is known to the history of the country, with the exception of one solitary circumstance, the President of the United States has stood up in letter and in spirit to what he believed to be the terms of this resolution which was adopted with something approaching unanimity in both houses of Congress in 1861. In the progress of the war he felt that it was necessary for him to yield the question of slavery so far as he had any influence in the State or section of country in which he resided. He did yield, and he went as far as the farthest to proclaim emancipation in the State over which he had been placed as military governor; but in all other respects he has endeavored to carry out the terms of this resolution, which was introduced by himself in the Senate, and into the other house by the venerable Crittenden, known to you all, who now is no more, but whose memory will be cherished with veneration and respect so long as America shall have a name. So long as talent and genius and independence and faithfulness and firmness shall be venerated and respected, the name of that great and good man will be honored in our own and all other lands.

Do not misunderstand me, senators. It is not my purpose to enter to-day upon any discussion of the differences of opinion between the Congress of the United States and the President in regard to the different reconstruction policy which has been pursued by each. I only advert to it for the purpose of showing that there was a pledge that the dignity, equality, and rights of the States should be preserved; and in 1860 and 1861, when the galleries of this Senate rang with shouts and applause of the multitude, when fair women and brave men were not ashamed to express their admiration for and gratitude to him who is now on trial before you, he advocated a doctrine which was exceedingly obnoxious to the people of the southern States. What was that doctrine? It was that the Congress of the United States had the power to compel obedience to the Constitution and laws of the United States. He denounced the doctrine of secession. He denied that any State had the right to withdraw from the Union without the consent of all the States. He insisted that the whole power of the government should be brought into requisition to keep those States within the Union.

He faithfully maintained his principles during the war. When the war was over; when Lee surrendered suddenly and unexpectedly; when the government was cast upon him by an act beyond his control; when all its responsibilities were devolved upon him, and in the sudden emergency in which he was called upon to act it was necessary for him to act promptly, to act hastily, to act speedily, so as to bring the state of hostilities to a final termination as soon as possible, senators, what did he do? There was no time to call Congress together, no time to assemble the representatives of the nation, for the situation of the country, upon Lee's surrender, demanded immediate and prompt action. What did the President do? According to the testimony of Mr. Stanton himself, which is now known and familiar through all the land, the President of the United States undertook to carry out what he believed to be the policy of his lamented predecessor. He undertook this in good faith. He retained the cabinet which Mr. Lincoln left. He manifested no desire to segregate himself from the party by whom he had been elevated to power. He endeavored faithfully to carry out the provisions of the resolution of 1861 to preserve the dignity, equality, and rights of the States, and not to impair them in the slightest degree.

And now the question which I put before this Senate and before the whole country is this: suppose he committed an error; suppose he is wrong; suppose Congress is right; in the name of all that is sacred, I ask, can you predicate guilt

of any acts like these? In the name of all that is sacred, I ask, can any one say that he is a traitor to his principles, or a traitor to the party that elected him? It is a mere difference of opinion, an unfortunate, a very unfortunate one, between him and the Congress of the United States; but who can say in the spirit of candor and truth that he was not endeavoring and did not in all his acts strive to carry out what he believed to be the policy of the party by whom he was elevated to power? When he did everything that he thought it was necessary to do; when, following the example of Mr. Lincoln in regard to Arkansas and Louisiana, and certainly following the spirit of Mr. Lincoln's proclamations and efforts, he sought to restore the other southern States to the relations which they had maintained to our common Union before the civil war commenced, I ask who can say that there was guilt in all this? You may differ with him in opinion; you may think he was wrong; I have no doubt that a large majority of the senators whom I address do conscientiously and honestly believe that he was wrong; but still, senators, does the mere fact that you think he was wrong disrobe this case of that part of our defence which rests upon the honesty and integrity of the judgment which he exercised? In the name of all that is sensible I ask, is a judge to be tried because he mistakes the law in a charge to a jury? I need not turn to authorities; I need not read law books to satisfy the honorable Senate that every man acting in a judicial capacity, from a simple justice of the peace up to the Chief Justice of the highest court in the United States, is protected by the laws of the land in the faithful and honest exercise of the judgment that is conferred upon him.

You have heard a great deal, senators, about the doctrine of implied powers. I may have occasion to speak of that again in another part of my observations to you; but now let me put one plain, simple question to this Senate and to the whole country: can any man put his finger upon any sentence or clause in the Constitution of our country which says who is to restore the relations of peace in the land when they have been disturbed by a civil war? You have the power to suppress rebellion; but the very moment you go beyond the language of the Constitution you launch out into implied powers. The very moment you depart from the language of the Constitution you are obliged to resort to the doctrine of implication, and the very moment you admit the doctrine of implication then I maintain that that doctrine is just as applicable to the President of the United States as it is to any senator or to any representative.

I know to whom I am addressing myself; I know the intelligence and the high respectability of this great tribunal; but I put the question with fearless confidence to every senator: where do you get the power in the Constitution to pass your reconstruction laws? Where do you get it unless you get it under the power to suppress insurrection? Where do you get it unless you obtain it under those general powers by which the war was carried on, and under which it was declared that a government has an inherent right to protect itself against dissolution? Where do you get the power elsewhere? In the name of law and order and justice that you have inscribed upon the tablet over the door that enters into this magnificent chamber, and which I trust will be inscribed in characters of living light upon the mind and the heart of every senator I address to-day, I ask you, senators, where do you get this power if you do not get it by implication? The Constitution is silent. It does not say that Congress shall pass laws to reconstruct States that have been in rebellion. It does not say that the President of the United States shall do this. You are obliged to resort to implication. He is the commander-in-chief of your armies. The country was in a state of war; peace had not been declared when these measures of his were undertaken. It was necessary to protect the country against disbanded armies, against the ravage and the ruin that were likely to follow in the wake of thousands upon thousands of soldiers who were discharged and turned loose upon the country. I repeat, there was no time to

Digitized by Google

falter, no time to hesitate, no time in which even to ask the judgment and the aid of the Congress of the United States. He was forced to act; and if, in the construction of the powers and duties that belong to him as President of the United States, as commander-in-chief of your army, as the principal executive officer in the land, your President mistook his powers, if he misconceived them, if he fell into the error into which you may say that Mr. Lincoln, his lamented predecessor, had fallen, I ask you, gentlemen, is there to be no charity, no toleration, no license, no liberality for a difference of opinion? Have we gone back two hundred years in the history of the world to the period when, as you all know, it was customary, especially in regard to religious opinions, to burn at the stake for differences in opinion; or do we live in the midst of the light of the nineteenth century, when the gospel is spread abroad, when a liberal and enlightened spirit characterizes the age, when the human mind has been developed in such form and to such extent as the world never witnessed before? I ask you, senators, is he to be judged in the spirit of the dark and the middle ages; are you to go back to the history of the midnight of mankind in order to find a rule for his conduct; or are you to judge him with a liberal, enlightened, patriotic judgment, and give his conduct the weight to which it is entitled?

I maintain on this great subject that the President in his position as the chief executive officer of the land was entitled to form a judgment; that he was compelled to form it; and that even if his actions were erroneous and contrary to the Constitution, if he was governed by honest and correct and upright motives, his honesty and integrity of motive in this court or any court under the heavens is a shield and a protection to him against all the darts that may be levelled at him from any quarter, high or low. The servant that knew his master's will and did it not was punished; but never the servant who did not know his master's will, or who erred, and honestly erred, in the exercise of the best judgment and reason he possessed.

Senators, I maintain that this cursory glance at the history of the country and of the difference of opinion that exists between Congress and the President is sufficient to show that he was animated by upright and correct motives, and that he ought not to be judged in the spirit in which the honorable managers ask that he shall be judged; his acts ought not to be condemned; but you ought to give him at least the merit of having had reason to act in the manner in which he did act.

Without discussing the questions, but merely for the purpose of recalling the attention of senators to certain dates, I beg leave to remind you, as I have already done, that, according to Mr. Stanton's own testimony in another investigation, which has been published under the authority of Congress, the President of the United States endeavored to carry out what he believed to be the policy of Mr. Lincoln; and after referring to some few dates and circumstances I shall pass from this part of the history of our country without undertaking to discuss the merits of the difference of opinion between Congress and the President. I only allude to it for the purpose of relieving him from the charge of being a usurper, a traitor, a tyrant, a man guilty of every crime known under the heavens!

Mr. Lincoln, in his proclamation of July 8, 1864, stated that he had failed to approve the first reconstruction bill passed by Congress on the 2d of July, 1864, and had expressed an unwillingness to set aside the constitutions of Arkansas and Louisiana. In his proclamation of December 8, 1863, he had invited—mark my language—he had invited the people of the rebellious States to form new constitutions, to be adopted by not less than one-tenth of the voters who had voted at the presidential election of 1860, each of whom should take the oath of amnesty prescribed by his proclamation. President Johnson, as you know, when he came into power, recognized Governor Peirpoint's government in Virginia, a government, if I am correctly informed as to its history, actually

Digitized by Google

embracing only a few counties of the State of Virginia during the war; but which the Congress of the United States thought, and rightfully thought, was sufficiently well organized to justify it in consenting to the formation of a new State, now known as the State of West Virginia.

This is the correct statement of the case, if I am not misinformed as to facts of history; and, senators, you will pardon me if I should fall into errors on these subjects, because, as I have stated to you, I am no politician. It is like carrying coals to Newcastle or telling a thrice-told tale for any of us to argue these questions before senators and representatives who are much more familiar with them than we are, and if I should fall into any errors I beg you to believe that they are errors of ignorance and not of design. I know the great superiority that the gentlemen who are managers in this cause have over us in their knowledge of these matters, because each member of the House of Representatives and every senator in reference to these subjects may say of himself "*pars fué;*" you have all been concerned in them, and they are much more familiar to you than they are to me. Still, senators, I beg leave to remind you that President Johnson recognized the Peirpoint government. That government was recognized as the State government of Virginia under an election held by the people of that State, and under that election West Virginia was formed into a new State, and all this was done, if I am not misinformed, without any act of reconstruction being passed by the Congress of the United States.

When President Johnson came into power and saw that the Congress of the United States had recognized the existence of the State of Virginia and had formed West Virginia into a new State within her jurisdiction, was he not justified in the belief that by recognizing the Peirpoint government he was pursuing not only the policy of Mr. Lincoln and the party that elevated him to power, but the policy of the Senate and House of Representatives of the United States? Surely so; and if he committed an error it was an error of the head and not an error of the heart, and it ought not to be made a matter of railing accusation against him.

The President when he came into office was guided by these precedents, and, if you allow me to coin a word, by the unapproved act of 1864, (Mr. Davis's bill,) which recognised the right of the President to appoint military governors. Now, without dwelling upon that point, I simply recall to your recollection the fact that by a proclamation he recognized Francis H. Peirpoint as governor of Virginia on the 9th of May, 1865. Between the 29th of May and the 13th of July, 1865, he appointed provisional governors for North Carolina, Mississippi, Georgia, Texas, Alabama, South Carolina, and Florida. In October, 1865, he sent despatches to Governor Perry, of South Carolina, and others, urging the adoption of the anti-slavery amendment. And on the 4th of December, 1865, he communicated his action to Congress, denying that secession had segregated the rebellious States from the Union, and leaving it to each house to judge of the elections, qualifications, and returns of its own members.

Now, senators, let me pause a moment and ask you the question here, up to that time, up to the assembling of the Congress of the United States in December, 1865, who was there in all this broad land, from one end of it to the other, that dared to point "the slow, unmoving finger of scorn" at Andrew Johnson and say that he was a traitor to his party, or say that he had betrayed any trust reposed in him? He was faithfully carrying out what, I repeat, he believed to be the policy of Congress and of his predecessor. He was anxious that this Union should be restored. He was anxious to pour oil upon the troubled waters and heal the wounds of his distracted and divided country. If he erred in this, it was almost a divine error. If he erred in this, it was a noble error. It was an error which was intended to restore peace and harmony to our bleeding country. It was an error which was designed to banish the recollection of the war. It was an error which was intended to bring into fraternal embrace

the fathers and the sons, the brothers and the sisters, the husbands and the wives, who had been separated through that awful calamity which overshadowed our country and that terrible civil war which drenched the land in human gore.

I say that if he committed an error in this, it is not an error that should be imputed as a crime, and however greatly you may differ from him, if you will pronounce upon his conduct that judgment which I invoke elevated judges to pronounce; if you pronounce that cool, calm, dispassionate judgment which must be exercised by every one of you who intends faithfully to redeem the pledge which he has made to God and the country, I think, senators, you will surely acquit him of many of the accusations that have been made against him.

One other thought before I leave this branch of the subject. On the 20th of August, 1866, the President of the United States proclaimed the rebellion at an end, and on the 2d of March, 1867, an act was approved entitled "An act to provide for the temporary increase of the pay of officers in the army of the United States," by the second section of which it is enacted:

That section one of an act entitled "An act to increase the pay of soldiers in the United States army, and for other purposes," approved June 20, 1864, be and the same is hereby, continued in full force and effect for three years from—

Mark the language—

From and after the close of the rebellion as announced by the President of the United States by proclamation bearing date the 20th day of August, 1866.

There is a legislative, a congressional recognition of the fact that the war is at an end; there is a recognition of the President's power so to proclaim it; and without discussing the question, (for I have said I will not enter upon the discussion of it, though I am invited to it, I might almost say, by the repeated remarks which have been made by the honorable managers,) I maintain that this legislative recognition of the President's proclamation announcing the termination of the civil war, the close of the rebellion, was a recognition of the fact that the southern States were not out of the Union, and that it goes far to extenuate, if not to justify, the view which the President of the United States took in reference to the restoration of these States to their harmonious relations with the government of the country.

And now, senators, having disposed to some extent, but not entirely, of these personal charges which have been made against the President, having reviewed briefly and imperfectly something of his personal and political history, I invite you to look back upon the record of his whole life, and in his name I ask you, and I ask the country to-day, as Samuel asked the people of Israel in the olden time:

Behold, here I am; witness against me before the Lord and before His anointed, whose ox have I taken? or whose ass have I taken? or whom have I defrauded? whom have I oppressed? or of whose hand have I received any bribe to blind mine eyes therewith? and I will restore it to you.

And I trust that the answer of this Senate, and the answer of the whole country, will be such as the people of Israel gave; for,

They said, thou hast not defrauded us, nor oppressed us; neither hast thou taken aught of any man's hand. And he said unto them, the Lord is witness against you and His anointed is witness this day that ye have not found aught in my hand. And they answered, he is witness.

The President appeals with proud confidence to the Senate and the whole country to attest the purity and integrity of his motives; and while he does not claim that his judgment is infallible, while he does not claim that he may not have committed errors—and who in his position may not have committed great and grievous errors—while he claims no such attributes as these, he does claim, before this Senate and before the world, that he is an honest man, that he is a man of integrity, that he is a man of pure and upright motives; and notwithstanding the clamor that has been raised against him, he feels it, and he appeals to the judgment of this Senate and of the world to vindicate him in it.

Google

Mr. Chief Justice and Senators, one of the first questions which, as I respectfully think, is of importance in this cause is a question which I have barely touched in passing along, but have not attempted to consider. That question is, what sort of tribunal is this? Is this a court or is it not? Some votes have been taken, senators, as you know, in the progress of this cause upon this question. It has not been discussed according to my recollection by any of the counsel for the President. At an early period of the trial you retired to your chamber to consider of it. What debates you had there I know not. Whether they have been published I know not. Your votes were announced by the Chief Justice, but whether the discussions in the secret session of the Senate have been published, I confess I am ignorant. All that I have to say is that if they have been published I have not seen them. While I do not know to what extent the opinion of senators may be fixed and formed upon this question, I ask, as a matter of right, whether you consider yourselves as having decided it or not, that you will allow me to address myself for a short time to the consideration of this which I regard as one of the greatest questions that ever has been presented since the formation of our government. I think I am not asking too much at the hands of the Senate when I ask to be heard upon this subject; for even if you have decided the question, if you follow the analogy furnished from courts of law and equity, where a rule for a new trial may be entered at *nisi prius* or a petition for a rehearing may be filed in a court of chancery, or a bill of review or a reargument or anything that a judge may deem proper to be heard upon a subject that is before him, it will not be asking too much for me to request you to hear me for a few moments upon this subject.

It was argued by the honorable manager who opened this cause that this is a mere Senate; that it is not a court. I will call your attention to a single paragraph or two in the learned argument of the able gentleman who has managed this cause with such consummate tact and ability on the side of the prosecution, and from whom we have had so many fine examples of the decency and propriety of speech. He says:

I trust, Mr. President and Senators, I may be pardoned for making some suggestions upon these topics, because to us it seems these are questions not of form, but of substance. If this body here is a court in any manner as contradistinguished from the Senate, then we agree that many, if not all, the analogies of the procedures of courts must obtain: that the common-law incidents of a trial in court must have place; that you may be bound in your proceedings and adjudication by the rules and precedents of the common or statute law.

* * * * * *

We claim and respectfully insist that this tribunal has none of the attributes of a judicial court as they are commonly received and understood. Of course, this question must be largely determined by the express provisions of the Constitution, and in it there is no word, as is well known to you, senators, which gives the slightest coloring to the idea that this is a court, save that, in the trial of this particular respondent, the Chief Justice of the Supreme Court must preside.

That position has been affirmed again in argument by others; and treatises, I had almost said volumes, have been written upon this subject. Able and learned arguments have been presented to the Senate, and through the newspapers to the public, upon this question. Gentlemen in their researches have gone back to the black-letter learning of the English law books and the English Parliament to search for precedents, to search for authorities in reference to this great question; and the position which they have assumed and most learnedly and persistently insisted upon is that this high court of impeachment possesses all the powers of a court of impeachment in England; that it is to be governed by the sames rules and the same regulations; that you are not to go to the common law for precedents or principles to guide your judgment, but that you are, in the language of two of the ablest gentlemen on the other side, "a law unto yourselves." Let us consider this position for a moment. I have but one answer to make to it.

It is not my purpose to follow the industrious and careful and diligent and

learned managers on the other side, and I do not utter these as words of vain and empty compliment, for they have bestowed a degree of labor, industry, and research in the investigation of this cause that is in the highest degree creditable to their talents and to the integrity and fidelity with which they are endeavoring to discharge the trust that has been reposed in them by the House of Representatives. But, with the greatest respect for the ability and learning which have been displayed upon the other side, I beg leave, Mr. Chief Justice and Senators, to submit to your consideration one or two arguments which it strikes me are pertinent and appropriate.

In the first place, I deny that you are to go to the law of Parliament, the *lex parliamentaria*, for the authority which is to guide and govern and control in this great trial; and why do I say so? Because I maintain that this tribunal is different from any tribunal that the world ever saw. No such tribunal is known in history. It never had a parallel. It never had an existence until it sprang into being, full-armed, like Minerva from the brain of Jove, under the creative hand of those who framed the Constitution of the United States. You are to interpret it, as I maintain, not by the lights of English history alone, but by the light of the circumstances under which the Constitution of the United States was adopted.

I do not say, Mr. Chief Justice, that you are to ignore history; I do not say that you are to ignore a knowledge of the decisions that have been made in Parliament or that have been made in the courts of justice of England. I grant that upon some subjects it is perfectly right and proper to go to English history, to examine English law books, to investigate English causes, with a view of interpreting phrases and terms that were known to our fathers, and that have been incorporated into the Constitution of the country; but none of them afford any clue to this investigation, none of them afford any light upon this subject; and why? Because, I repeat, this tribunal has no exemplar in the history of the world. It is the tribunal of the American Constitution, and we must look to the language of the American Constitution in order to ascertain what it means; and I ask—and I hope your honor will not take any offence at my using phraseology which I am sure is not intended to give any—I respectfully ask this Senate, whether it was the intention of the framers of the Constitution that the Chief Justice of the United States should be called down from the most elevated tribunal upon the face of the earth to preside over your deliberations, and that when he comes here he shall have no more power than an ordinary Speaker of an ordinary House of Representatives, and hardly so much; that he shall be a mere automaton, a machine, a conduit through whom the votes of the Senate are to pass to the records of the country?

I insist that there was an object, a high object and purpose in the framers of the Constitution when they called the Chief Justice from his lofty position to preside over the deliberations of the Senate. There was an object and a purpose, an object such as never had been attained in English history; an object such as was unknown to the British constitution; for, may it please your honor, under the British constitution, as I understand its history, Parliament did not consider themselves bound by the judgment of the judges, although they often consulted them upon legal questions. I maintain that instead of that fact furnishing an argument, as they have attempted to use it on the other side to prove that it was the intention of the framers of the Constitution that the Chief Justice should be a mere automaton or cipher in this trial, when you look to the history of the formation of the Constitution every intendment is to be taken to the contrary.

Now, without taking up too much time, senators, on this question, interesting and important as it is, I beg leave to remind you of some facts connected with the history of this subject. I do not consider that it is necessary for me to bring in volumes here and to read page after page to the Senate upon this

Digitized by Google

subject. I take it for granted that senators are informed, and no doubt a great deal better informed upon it than I am. All that I deem it material and important to do is to refresh your recollection in regard to some of the circumstances connected with the incorporation of this provision into the Constitution of the United States. You will recollect, senators, that when the Constitution was about to be formed, various plans of government were offered. Without bringing in the volumes or taking up the time of the Senate to read at length the different plans of government which were proposed by different members of the Convention that formed the Constitution, I only call your attention to so much as I think is pertinent to this question. You remember that Colonel Hamilton introduced what was called a plan of government, and in the ninth section of that it was provided that—

Governors, senators, and all officers of the United States to be liable to impeachment for mal and corrupt conduct, and upon conviction to be removed from office and disqualified from holding any place of trust or profit; all impeachments to be tried by a court.

Mark the proposition, for it is in the light of these propositions that I maintain we are to arrive at a true and correct interpretation of the Constitution itself:

All impeachments to be tried by a court, to consist of the chief or senior judge of the superior court of law in each State: *Provided*, that such judge hold his place during good behavior, and have a permanent salary.

That was introduced on the 18th of June, 1787, and will be found in 1 Eliot's Debates on the Federal Constitution, page 180. Mr. Randolph had a plan of government; and the thirteenth proposition contained in Mr. Randolph's plan was in these words:

Resolved, That the jurisdiction of the national judiciary shall extend to cases which respect the collection of the national revenue, impeachment of any officer, and questions which involve the national peace and harmony.

That was introduced on the 19th of June, 1787, and is set out in 1 Eliot's Debates, page 182. In Mr. Charles Pinckney's plan, introduced on the 19th of May, 1787, four days after the convention was organized, it was provided that—

The jurisdiction of the court to be termed the Supreme Court should extend to the trial or impeachment of officers of the United States.

That is set out in the first volume of the Madison Papers, page 121. Mr. Madison preferred the Supreme Court for the trial of impeachments, or rather a tribunal of which that should form a part. (See the supplement to Eliot and 5 Madison Papers, page 528.) Mr. Jefferson, in his letter of the 22d of February, 1798, to Mr. Madison, alludes to Mr. Tazewell's attempt to have a jury trial of impeachments. That will be found in the fourth volume of Jefferson's Works, page 215.

Mr. Hamilton, in the Federalist, No. 65, says:

Would it have been an improvement of the plan to have united the Supreme Court with the Senate in the formation of the *court of impeachments*? This union would certainly have been attended with several advantages; but would they not have been overbalanced by the signal disadvantage already stated, arising from the agency of the same judges in the double prosecution to which the offender would be liable? To a certain extent the benefits of that union will be obtained from making the Chief Justice of the Supreme Court the president of the court of impeachments, as is proposed to be done in the plan of the convention; while the inconveniences of an entire incorporation of the former into the latter will be substantially avoided. This was perhaps the prudent mean.

Messrs. Madison, Mason, Morris, Pinckney, Williamson, and Sherman discussed the impeachment question, and in lieu of the words "bribery and maladministration," Colonel Mason substituted the words "other high crimes and misdemeanors against the state," as is shown in 5 Eliot's Debates, and Madison Papers, 528, 529. On the same day a committee of style and arrangement was appointed, consisting of Messrs. Johnson, Hamilton, Morris, and King. On

Wednesday, the 12th of September, 1787, Dr. Johnson reported a digest of the plan. On Monday, the 17th of September, 1787, the engrossed Constitution was read and signed, as will be seen in 5 Madison Papers, page 553.

So far, senators, as I have examined this question, it does not appear when or how the words "when the President of the United States is tried the Chief Justice shall preside," now in the Constitution, were inserted. No doubt you are much better informed upon this subject than myself. I have, however, seen it stated that they must have been introduced upon a compromise in a committee, and that this fact is shown by Mr. Madison's writings; but in the researches which I have been able to make in the comparatively short time during which this investigation has been going on, I have not been able to ascertain whether that reference is correct or not. I have not had the long period of twelve months' incubation which the gentlemen on the other side have had, within which to prepare myself upon this great subject. But so far as I do comprehend or understand it, I maintain the following propositions, to which I ask the attention of the Chief Justice and of the Senate; I shall not dwell upon them at any great length; it will be for you, senators, and for him, to judge and decide whether any, and if any, how many of them are founded in sound reason.

I say that the law of Parliament furnishes no satisfactory exposition as to the office and duty of the Chief Justice on an impeachment trial. The interpretation must have been found in the light of the circumstances under which the provision was inserted. The anxiety of many members of the convention to intrust impeachment to a judicial tribunal proves that they believed the learning and intelligence of the judges were essential elements to a fair determination. I think that is one of the most important considerations in the investigation of this great question. You have seen that one of the plans was to have impeachment tried by a court to be constituted of judges from each of the States; another plan was to have them tried by the Supreme Court of the United States; and another plan was to have the Supreme Court associated with the Senate upon the trial. Mark you, every one of these plans of impeachment looked to judicial aid and assistance in the trial of the cause; and when the convention finally determined that the Chief Justice should preside, I maintain, senators, they determined that he should come here as a judge, that he should come here clothed as he is in his robes of office, that he should declare the law and pronounce a judicial opinion upon any question arising in the cause. And while, sir, I know it is for your honor to determine what course you will pursue, while I do not presume to dictate to this honorable court or to the Chief Justice who presides over it—it is my province to argue; it is your province, sir, to decide and to determine—I yet respectfully insist before the Senate and the world, that I have the right, as one of the counsel for the President of the United States, to call, as I do call, upon the venerable Chief Justice who presides over your deliberations, for an expression of his judgment and opinion upon any question of law which may arise in this case.

And how, in the name of common sense, does this doctrine of mine trench in the slightest degree upon any right or privilege of the American Senate? Does it conflict with any duty or with any power that is imposed upon you by the Constitution of our common country? Senators, learned as you are, respectable as is your standing at home, high as is the position which the States that have placed you here have conferred upon you, you may still derive instruction from the opinions of a gentleman learned in the law and holding the highest judicial office in the land. Does it invade any privilege or any prerogative—though I do not like to use that word—or any power of the American Senate to say that we ask that they may be guided in their deliberations by the profound and dispassionate judgment of one who is presumed to hold the scales of justice in an unfaltering and untrembling hand, one who holds his office independent of popular excitement and popular commotion, one who has been elevated to his

high and lofty position because of his learning, his integrity, his talents, his character. Is it, I ask, any disparagement even to the American Senate, to respectfully request of him that he shall deliver an opinion to you upon any of the questions that may arise in this cause?

Then, senators, it will be for you to judge and determine for yourselves, under such opinion, what may be the duty that you have to perform in this case. I insist that so far from this being an argument in disparagement either of the power or of the intelligence of the Senate, it is an argument which in its nature is calculated to aid the Senate as a court in arriving at a correct conclusion; and that no man who regards the Constitution and the laws of the land, no man who is in search of justice, no man who is willing to see the laws faithfully and honestly and impartially administered, can for one moment deny the right of this great civil magistrate, clothed in his judicial robes and armed with all the power and authority of the Constitution, to declare what he believes to be the law upon questions arising in this cause.

I hope you will pardon me for dwelling on this point for a few moments, as it has not been discussed, I believe, by any of the gentlemen who are counsel for the President. Indeed, I do not know that I represent the opinion of any gentleman who is counsel for the President, except myself; but I think that as one of his counsel I have a right to submit any views or opinions that I entertain in reference to the case to the consideration of the Chief Justice and the senators. When you look to the clause of the Constitution under which this power is conferred, I say that every word in it is a technical word. The Senate shall try an impeachment. I do not quote the words literally, and it is not necessary to turn to them. They are familiar to you all. The Senate is to try an impeachment; and upon this trial the senators shall be upon oath or affirmation; and when the President is tried the Chief Justice shall preside.

What is the meaning of the word "trial?" It is unnecessary for me to enter into any elaborate definition of it. It is enough for me to say that it is not used in the Constitution in the sense of suffering; it is not used in the Constitution in many of the senses that it is used in common parlance; but it is used in the sense of a judicial proceeding, and here, as I have admitted, you must go to the fountains of the English law, you must go to the terms that were in existence at the time when the Constitution was adopted, for the purpose of ascertaining and determining what is the meaning of the word "trial." It is a word dear to every Englishman; it is a word dear to every American. The idea of a judicial trial, a trial in which a judge is to preside, a trial in which a man skilled in the law and supposed to be a man of integrity and independence is to preside, is a proceeding that is dear to every Englishman and dear to every American; because for centuries it has been regarded in England, and ever since the formation of our own government here, as essential to the preservation of the liberty of a citizen that a trial is to be conducted with all the aid of judicial interpretation that can be afforded.

Mr. Worcester defines "preside" to be "set aside or placed over others; to have authority over others; to preside over an assemblage." "Trial" is not used, as I say, in the sense of temptation or suffering, but to convey the idea of a judicial proceeding similar to a court and jury. And I insist that when the term "Chief Justice" is used as it is, the term "Chief Justice" is itself a technical word. What does it mean? It means a judicial officer. The Constitution does not say in so many words that there shall be a judicial tribunal in which there shall be a chief justice. It authorizes Congress to create judicial tribunals. It took it for granted that there would be a court; it assumed that in that court there would be a chief justice, and that he should be a judge; and when it assumed that, it assumed that he should act in the capacity which I have insisted upon.

Digitized by Google

Without dwelling upon this argument further, I can only say that in the

views which I entertain of the question I conceive it to be one of the most important questions that ever were presented for consideration in this or any other country. So far, we all know, senators, that this is the first case under the American Constitution in which the Senate has been called upon as a court of impeachment to try the Chief Magistrate of the land. If our government survives the throes of revolution, if our government continues as it is, undiminished, unimpaired in the hands of posterity, the precedent which you are to form now will last for a thousand years to come, and the decision which is made now is a decision that will be quoted in after ages and that will be of the very utmost and highest importance; and I maintain that in the view which has been presented we have a right to call upon the Chief Justice to act not merely as presiding officer, but to act as a judge in the conduct and management of this trial.

I have already referred to some startling and extraordinary propositions which are made by the managers; I must notice some others. Mr. Manager Bingham says—I quoted the expression awhile ago—that you are "a rule and a law unto yourselves." Mr. Manager Butler proclaims that, "a constitutional tribunal, you are bound by no law, either statute or common." He says further, that "common fame and current history may be relied on to prove the facts;" that is, to prove the President's course of administration; and, further, that "the momentous question" is raised "whether the presidential office ought in fact to exist."

Senators, in the whole progress of American history I have never read, or heard, or seen, three such startling propositions as these which are insisted upon by the honorable managers on the other side. They are dangerous to liberty. They are dangerous to the perpetuity of the Constitution and the American government. They would overthrow every principle of justice and of law which is known to the civilized world if they were carried out to the extent which the honorable gentlemen insist upon. In this land of liberty, this land of law, this land where we have a written Constitution, who ever heard or dreamed that such doctrines would be asserted here?

If I do not misunderstand the language of the honorable gentleman who opened the case, he thinks that this Senate has the power to set aside the Constitution of the United States itself. Many of the most eminent and learned writers in England and our own country, in treating on the subject of the distribution of powers between the three departments of the government, the executive, the legislative, and the judicial tribunal, have sounded a note of warning that the danger is to be apprehended from the executive; it is not to be apprehended from the judicial department, but it is to be apprehended from the encroachments of the legislature, from the popular branch of the government; and now we hear a learned, able, and distinguished leader of the House of Representatives, the chief manager in this impeachment trial, boldly assuming, as I understand his argument before the American Senate, that you have the right to judge and determine for yourselves whether the American Constitution shall last.

Senators, such a notion is not in conformity to the healthful doctrines of the American Constitution. The real true sovereignty in this land is not in you; it is not in the President; it is not in the Chief Justice; it is in the American people, and they, and they only, can alter their Constitution. No Senate, no House of Representatives, no judge, no Congress can alter the American Constitution. I know that now-a-days it excites almost ridicule with some to hear anything said in behalf the American Constitution. On one occasion since the commencement of this trial, when a witness spoke of the President of the United States saying that he intended to support the Constitution of the country, it excited a universal smile in the Senate and in the gallery. That venerable instrument which was established by the wisdom of some of the bravest and best men that the world ever saw, that noble instrument which was purchased with

the blood and the treasure of the Revolution, and which we have been accustomed to regard with sacred reverence, seems to have been so often trampled upon and violated in this land that when one dares to mention it with something of the reverence of ancient times, something of the respect which we have been accustomed to cherish for it, it excites a smile of derision and laughter in the land. God grant that a more healthful sentiment may animate and inspire the hearts of the American people, and that we shall return, now that this war has passed away, to something of our former veneration and respect for the American Constitution, and that we shall teach our children who are to come after us to love and revere it, as was taught in times past, as the political bible of the country; that it is not to be treated with aught but respect and that reverence and that high consideration which we were formerly accustomed to bestow on it.

"Common fame" you are to resort to! Is it possible that we have come to this? Is it possible that this great impeachment trial has reached so "lame and impotent a conclusion" as this, that the honorable manager is driven to the necessity of insisting before you that common fame is to be regarded as evidence by senators? I hope it will not grate harshly upon your ears when I repeat the old and familiar adage that "common fame is a common liar." Are the senators of the United States to try the Chief Executive Magistrate upon rumor, the most dangerous, the most uncertain, the most unreliable, the most fatal and destructive proof that ever was offered under the sun? Why, the glory and boast of the English law and of the American Constitution are that we have certain fixed principles of law, fixed principles of evidence that are to guide, to govern, to control in the investigation of causes; and one of the beauties, one of the greatest perfections of the system of American jurisprudence is that when you go into a court of justice nothing scarcely is taken by intent. There sits the judge; there are the jury; here are the witnesses who are called upon to testify; they are not allowed to give in evidence any rumor that may have been afloat in the country; they are compelled to speak of facts within their own knowledge. The case is investigated slowly, cautiously, deliberately. The truth is arrived at, not by any hasty conclusion, but it is arrived at upon solemn trial and upon patient and faithful investigation; and when the result is attained it commands the confidence of the country, it secures the approbation of the world, and that result is acquiesced in by the citizen; and if it be in a higher court it passes into the history of law and goes down to posterity as a precedent to be followed in all time to come; and herein, senators, is the great security of the liberty that the American people enjoy.

I hope you will pardon me for giving utterance to one thought in this connection. I shall not say that it is original, but it is a thought which I have often cherished and indulged in. It is this: that the liberty of the American people is not that liberty merely which is defined in written constitutions; it is not that liberty which is enforced by congressional enactment; but, little as the American people think of it—and would to God that they would think of it a thousand times more intensely than they do—the only liberty that we have now or ever have had, so far as the American citizen is concerned, is that liberty which is enforced and secured in the judicial tribunals of the country. We talk about our social equality. We talk about all being free and equal. It is an idle song, it is a worthless tale, it is a vain and empty expression unless that liberty and that equality are enforced in a court of justice. There it is; I have seen it there, and so have you. It is the only place that I ever did see it. The poor man, the humblest man upon the face of the earth, I have seen come there as a plaintiff or a defendant; I have seen a thousand times the impartial judge, sitting blind to all external emotions and impressions, declare the law and try the cause and administer justice to this poor, ignorant, unfortunate man against the richest and the most powerful of the land. There is your law, there is your justice, there is the only liberty that is worthy of enjoyment; and to talk about

common fame and common rumor being admitted before the highest tribunal known to the Constitution as a criterion of judgment, would be, if admitted, to overthrow the Constitution itself, and to destroy the liberty which has thus far been enjoyed in the land.

"A law unto yourselves!" Senators, if this be so, our Constitution has been written in vain. If this be so, all the volumes that swell the public libraries of the country and the private libraries of lawyers and statesmen have been written and published in vain. "A law unto yourselves!" That carries us back almost in imagination to the days of the Spanish Inquisition, to some of those dark, secret, unknown tribunals in England, in Venice, in the Old World, whose proceedings were hidden from mankind and whose judgments were most awful and terrible and fearful in their results. No, sirs; no. I deny that you are a law unto yourselves. I maintain that you have a Constitution. I insist that you must look not to parliamentary history for the reasons that I have already stated, but look to the common law, not as an authoritative exposition of all the duties which are incumbent on you, but as a guide to enlighten your judgments and your understandings, and that you must be governed by those great eternal principles of justice and of reason which have grown up with the growth of centuries and which lie at the very foundation of all the liberty we enjoy. This, senators, is what I insist is the true doctrine of the American Constitution; and that this wild, latitudinarian, unauthorized interpretation of the honorable manager can find no lodgment anywhere in view of the correct and eternal principles of justice that are incorporated into the American Constitution and form part of the law in every State.

If that be so, if you are governed by no law, if you are "a law unto yourselves," if the Constitution has nothing to do with it, if "common fame" and "common rumor" are to govern and control here, then the very oath that you have solemnly taken is an extra-judicial oath, not binding upon the conscience, not binding according to the laws of the land, and it would invest the most dangerous power in the Senate of the United States that ever was invested in any tribunal upon the face of the earth. It would enable the Senate of the United States, under the pretext of being "a law unto yourselves," to defeat the will of the American people, and remove from office any man who might be displeasing to you, to set at naught their election, and to engross into your own hands all the power of the Constitution. Senators, I can conceive of no despotism worse than this. I can conceive of no danger menacing the liberties of the American people more awful and fearful than the danger that menaces them now, if this doctrine finds any sort of favor in the mind or the heart of any senator to whom it is addressed. I repeat, in regard to this, as I did in regard to some other matters awhile ago, that I do not believe the American Senate will, for one moment, cherish any such doctrine or act upon it in the slightest degree. The doctrine would prostrate all the ramparts of the Constitution, destroy the will of the American people, and it would engross into the hands of the Congress of the United States all those powers which were intended to be confided to the other departments and distributed among them.

Mr. Chief Justice, in considering the case now before us, there is a preliminary question underlying it which is of very considerable interest; and it is, what are crimes and misdemeanors under the Constitution? But before I pass to that I desire, while considering some of the extraordinary arguments that have been presented by the honorable managers on the other side, to remind the Senate and the Chief Justice of one proposition which was paraded at an early day of this trial. I regretted almost the moment I took my seat, after it was announced, that I had not answered it then; but it is in your record, and it is not too late to give a passing remark to it now.

The honorable manager [Mr. Butler] made use of the expression that "the great pulse of the nation beats perturbedly, pauses fitfully when we pause, and

Digitized by Google

goes forward when we go forward." And you have been told time and again that the honorable managers are acting for "all the people of the United States." I may have something to say about that, senators, before I close the remarks I have to make to you; but I shall postpone the consideration of that for the present.

Yes, the public pulse beats perturbedly; it pauses when you pause; it goes forward when you go forward; and you have been told time and again that the people out of doors are anxious for the conviction of the President of the United States. Will you permit me, senators, to be guilty of the indecorum almost of saying one word about myself, and I only say it by way of stating an argument. In the whole course of my professional career, from the time I first obtained, as a young man, a license to practice law, down to the present moment, I never had the impudence or the presumption to talk to a judge out of court about any case in which I was concerned. My arguments before him have always been made in court, always made in public. I have had sufficient respect for the independence of the judges before whom I have had the honor to practice my profession to take it for granted that they were men of honor, men of intelligence, and that they would not hear any remarks that I would attempt to infuse into their understandings out of doors and not in the presence of my adversary.

But the doctrine here is that the public pulse beats in a particular direction. Have we come to this? Is this case to be tried by the greatest court in Christendom, not upon law, not upon evidence, not under the instructions of the Chief Justice of the United States, but tried upon common rumor; and is it to become interesting or cease to be interesting just according to the beating of the public pulse? Why, senators, if it were not that I do not intend to say one word that is designed to be offensive to any of the gentlemen on the other side or to any senator, I would say that I would almost regard this as an insulting argument to them; but I shall not make use of that expression. It is not my intention, in anything I have said or may say, to wound the sensibilities of any one, or to give any just cause of offence to anybody who is in any way connected with this case. But you are to try it according to the public pulse! What an argument to advance to the American Senate! What an argument to put forth to the American nation! All history teems with examples of the gross, outrageous injustice that has been done in criminal trials, high and low, in parliamentary tribunals, and in the courts of justice; and I am afraid that our own country is not entirely exempt from some notable instances of it, where popular clamor was allowed to influence the judgment of judges; and those instances which are recorded in history, those instances of blood and of murder and of outrage and of wrong that have been perpetrated in the name of justice, are an admonition to us that the public pulse should have nothing to do with your judgment.

Senators, regarding every man whom I address as a judge, as a sworn judge, allow me for one moment to call your attention to one great trial in this country which I hope in some of its principles will be a guide to you; and I do not think it will be an unworthy guide in the investigation which you have to make here. There was a case which occurred in the early history of the American nation where there was a great political trial. The waves of popular excitement ran high. It was understood that the President of the United States himself desired the conviction of the offender. The public pulse beat fitfully then. It went forward as the judge went forward, and it went backward as the judge went backward. It was a great occasion. It was one of the most illustrious trials that ever occurred in English or American jurisprudence.

There was the great criminal, morally guilty no doubt, for so he has been held in the judgment of posterity. There sat the judge, one of the illustrious predecessors of the distinguished gentleman who presides over your deliberations now. There he sat, calm, unmoved, unawed, unmindful of the beating of the public

pulse, the very impersonation of Justice, having no motive under heaven except to administer the law and to administer it faithfully; and he had the nerve and the firmness to declare the law in the fear of God rather than in the fear of man; and although the criminal was acquitted, and although there was some popular clamor in regard to the acquittal, the judgment of posterity has sanctioned the course of judicial determination, and every American citizen who has any regard for his country, every judge and every lawyer who has any respect for judicial independence and integrity, looks back with veneration and respect to the name and to the conduct of John Marshall.

So long as judicial independence shall be admired, so long as judicial integrity shall be respected, the name of John Marshall will be esteemed in our own country and throughout the civilized world as one of the brightest luminaries of the law, as one of the most faithful judges that ever presided in a court. It is true that clouds and darkness gathered around him for the moment, but they soon passed away and were forgotten—

> "As some tall cliff that lifts its awful form,
> Swells from the vale and midway leaves the storm,
> Though round its breast the rolling clouds are spread,
> Eternal sunshine settles on its head."

Such was the name and such the fame of John Marshall, and God grant that his spirit may fall, like the mantle of Elijah, upon the illustrious magistrate who presides and every judge who sits here, that you may catch its inspiration, senators, and that you may throw to the moles and bats all appeals to your prejudices, all appeals from without, and that you may discharge your whole duty in the fear of that God to whom you appealed. If I might propose such a low, grovelling, contemptible consideration on the minds of senators here, if I might be pardoned for alluding to it, (for the very thought almost makes me shrink back with horror from myself,) I would say to you that if you were to rise above these prejudices, cast these clamors away from your thoughts, do your duty like Marshall did, in the fear of God, even in a low, pitiful, contemptible party point of view, it would make you stand higher with your own party and with the world than you would stand doing an act of gross injustice. Forgive me, though, for mentioning such a consideration, for I really think it is beneath the dignity of the Senate to entertain it for a moment. No, sirs; I treat you as judges; I treat you as honorable men; I treat you as sworn officers of the law; and thus treating you, I say that I banish all such thoughts from my mind, and I come before you as an impartial tribunal, believing before God and my country that you will try to do your duty in this case irrespective of popular clamors and regardless of opinions from without.

Such, I trust, will be the judgment of the whole land; and when you and I and all of us shall pass away from the scene of human action, when the memory of the stirring events which now agitate the public mind shall almost be forgotten, I trust that the after ages will look back with wonder and admiration and love and respect and honor to the American Senate for the manner in which they shall have discharged their duty in this case. I trust, senators, that the result will be such as will command the approbation not only of your own consciences, not only of the States that you have the honor to represent, but the approbation of Him who is a greater judge than you are, and the approbation of posterity who are to come after you.

Now, Mr. Chief Justice, I desire briefly to present to your consideration and that of the Senate this proposition; while we cannot go to the British constitution or the British Parliament or British law to ascertain the meaning of a court such as they never had, consisting of a Senate and Chief Justice, yet "treason, bribery, or other high crimes and misdemeanors" were words well known and defined at the date of the adoption of the Constitution; and in order to ascertain their meaning a most excellent rule of interpretation was adverted to by

Chief Justice Marshall in the trial to which I have referred. In Burr's trial, speaking of the term "levying war," used by the Constitution in the definition of treason, he says:

> But the term is not for the first time applied to treason by the Constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our law. It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the Constitution, that the term "levying war" is used in that instrument in the same sense in which it was understood, in England and in this country, to have been used in the statute of the 25th of Edward III, from which it was borrowed.—*Burr's Trial*, p. 308.

The words "treason, bribery, or other high crimes and misdemeanors," were words just as familiar to the framers of the Constitution as they are to us. One of the honorable managers made an argument here, if I understood it, to show that because Dr. Franklin was in London about the time of Warren Hasting's trial, that had a great deal to do with the proper mode of construing the American Constitution on the subject of the powers of the Chief Justice. But Blackstone's Commentaries no doubt were as familiar to the lawyer at the date of the formation of the American Constitution as that venerable work is to the lawyers and judges of the present day. "Crimes and misdemeanors" are the offences for which impeachment may be resorted to. You all know that in one passage of his work he says that crimes and misdemeanors are almost synonymous words; but in another and further exposition of it he undertakes to show, and does show, that the word "crime" is used in the sense of charging higher offences, such as usually fall within the denomination of felonies, and the word "misdemeanors," and those trivial and lighter offences which are not punishable with death, but by fine and imprisonment, or either, or both.

What is the rule of interpretation? It is unnecessary for me to turn to authorities on this question. You are to construe words in the connection in which they are used; you are to construe them in the sense of their being of the same kind or nature of other words. Now, if I correctly apprehend the law at the date of the American Constitution, treason by the law of England was a felony punishable with death; bribery was a misdemeanor not punishable with death, but punishable by fine and imprisonment. When the word "crimes," therefore, is used in the Constitution, the argument that I make is—and it has been made by one of the learned managers, I think, in a much more able manner than I can present it—I am willing to say I borrow it from the gentleman—that the word "crimes" is to be construed in the same sense as the word "treason;" it is to be understood as embracing felonious offences, offences punishable with death or with imprisonment in the penitentiary where they have penitentiaries in the different States. The word "misdemeanors" has reference to other and different offences altogether. It does not mean a simple assault, for the expression of the Constitution is "high crimes and misdemeanors"—"high crimes" referring, of course, to such crimes as are punishable with death; high misdemeanors referring to such misdemeanors as were punishable by fine and imprisonment, and not to such simple misdemeanors as an assault.

What, then, is the argument from that? I know there is a great difference of opinion on this question, and if I correctly apprehend Mr. Story's treatise on it in his admirable work upon the Constitution, he regards it as an open question to this day, or at least to the day at which he wrote, what is the true meaning of the term "crimes and misdemeanors" as employed in the Constitution of the United States. One party of constructionists, if I may so express myself, hold that you are not to look to the common law to ascertain the mean-

ing of the words "crimes and misdemeanors," but you are to look to the parliamentary law in order to ascertain it. So far as I have any knowledge on the subject, the parliamentary law does not define and never did undertake to define what is the meaning of "crimes and misdemeanors." What did the parliamentary law undertake to do? It undertook to punish not only office-holders but citizens for offences which were regarded as offences against the government. Often, without turning the offender over to the courts, the party was impeached or attainted by a proceeding in Parliament; but there is no definition there, so far as I know, of "crimes and misdemeanors;" they were, to use the language of the gentlemen, in great part "a law unto themselves."

But when the framers of the Constitution incorporated these words into our charter, did they borrow them from the parliamentary law, or did they get them from Blackstone and from Hale, and from other writers upon criminal law in England? Where did they obtain these words, "crimes and misdemeanors?" They got them from the common law of England, and not from the law of Parliament, as I insist; and then the proposition follows as a corollary from the premises I have laid down, if the premises be correct—it follows inevitably, if the proposition which I have assumed be a correct one, that the words "crimes and misdemeanors" are used in the sense in which they were employed by writers upon criminal law in England at the date of the Constitution, that nothing is an impeachable offence under the American Constitution except that which was known as a crime or misdemeanor within the definition of those words under the British law and that which may be created as such by the Constitution of the United States. I doubt even—and I submit that to the consideration of senators, I respectfully submit it as a doubt, and one well worthy of your consideration—whether the Congress of the United States, within the meaning of the American Constitution, has a right to create a new crime, a new misdemeanor, something that was not known as a crime or as a misdemeanor at the date of the adoption of the Constitution.

I think it is a matter of great doubt, to say the least of it; and in entertaining this opinion I at least am warranted by the doubts which have been thrown on the subject by some of the ablest text-writers upon the American Constitution. It is, Mr. Chief Justice, upon this, and upon kindred questions—no matter whether the views I have presented are right or wrong—that I submit that we have the right respectfully to demand at the hands of your honor a judicial exposition of the meaning of the Constitution. It will, as I said before, be for you, sir, under your sense of duty, under your own construction of the powers that are conferred upon you by the Constitution of our common country—it will be for you, in the discharge of your duty, to decide for yourself whether this respectful request will be answered or not.

Mr. YATES. If the gentleman does not desire to finish his speech to-night, I will move that the Senate, sitting for this trial, adjourn.

Mr. NELSON. It is my business and duty, of course, to be governed and controlled altogether by the pleasure of the Senate. I am free to say that I feel somewhat fatigued, and I would be much obliged to the Senate, if it would not interfere with their duties, for an adjournment at this time; but if they do not choose to do so I will go on. It is my wish to conform exactly to the will of the Senate, whatever it may be.

Mr. YATES. I submit the motion.

The CHIEF JUSTICE. The senator from Illinois moves that the Senate, sitting as a court of impeachment, adjourn until to-morrow at 11 o'clock.

The motion was agreed to; and the Senate, sitting for the trial of the impeachment, adjourned.

Digitized by Google

FRIDAY, *April* 24, 1868.

The Chief Justice of the United States took the chair.

The usual proclamation having been made by the Sergeant-at-arms,

The managers of the impeachment on the part of the House of Representatives and the counsel for the respondent, except Mr. Stanbery, appeared and took the seats assigned to them respectively.

The members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

The CHIEF JUSTICE. The Secretary will read the journal of yesterday's proceedings.

The journal of yesterday's proceedings of the Senate, sitting for the trial of the impeachment, was read.

The CHIEF JUSTICE. The first business this morning is the order proposed by the senator from Iowa, [Mr. Grimes,] changing the hour of meeting. The clerk will read the order.

The chief clerk read as follows:

Ordered, That hereafter the hour for the meeting of the Senate, sitting for the trial of the impeachment of Andrew Johnson, President of the United States, shall be 12 o'clock meridian of each day except Sunday.

Mr. WILSON. Mr. President, I ask for the yeas and nays upon that.

The yeas and nays were ordered; and being taken, resulted—yeas, 21; nays, 13; as follows:

YEAS—Messrs. Anthony, Davis, Doolittle, Ferry, Fessenden, Fowler, Grimes, Hendricks, Johnson, McCreery, Morgan, Morrill of Vermont, Norton, Patterson of Tennessee, Ramsey, Saulsbury, Trumbull, Van Winkle, Vickers, Willey, and Yates—21.

NAYS—Messrs. Conkling, Conness, Cragin, Edmunds, Harlan, Howe, Pomeroy, Sprague, Stewart, Sumner, Thayer, Tipton, and Wilson—13.

NOT VOTING—Messrs. Bayard, Buckalew, Cameron, Cattell, Chandler, Cole, Corbett, Dixon, Drake, Frelinghuysen, Henderson, Howard, Morrill of Maine, Morton, Nye, Patterson of New Hampshire, Ross, Sherman, Wade, and Williams—20.

So the order was adopted.

Mr. EDMUNDS. Mr. President, I offer the following order.

The CHIEF JUSTICE. The order proposed by the senator from Vermont will be read.

The chief clerk read as follows:

Ordered, That after the arguments shall be concluded, and when the doors shall be closed for deliberation upon the final question, the official reporters of the Senate shall take down the debates upon the final question, to be reported in the proceedings.

Mr. SUMNER. I object.

The CHIEF JUSTICE. The order will lie over if objected to.

Mr. Nelson, of counsel for the respondent, will please proceed.

Mr. NELSON. Mr. Chief Justice and Senators, in the progress of my remarks yesterday I alluded to certain opinions expressed by one of the honorable managers, [Mr. Wilson,] in a report to which his name is affixed, made to the House of Representatives. Lest any misunderstanding should arise from that reference, I desire to state that while I shall read a part of the report—that portion of it which I adopt as my argument—I do not consider that there is any inconsistency in the position which the honorable manager assumed in his report to the House of Representatives and the position which he has assumed here in argument. If I correctly understand the honorable manager's position, while he insists, as I insist in this case, that you are to look to the common law, and not merely to the law of Parliament, in order to ascertain the meaning of the words "crimes and misdemeanors" in the Constitution, yet he insists that it is competent for Congress to create a crime or misdemeanor under the Constitution by legislation, and that such crime or misdemeanor is an impeach-

Digitized by Google

able offence. I hope neither that honorable gentleman nor the Senate will misunderstand me with this explanation when I call attention only to those parts of the argument contained in his report which I rely upon, and because the definitions which he gives are in more appropriate language than any which I can furnish. In his report, at page 60, he says:

As was very pertinently remarked by Hopkinson on the trial of Chase, "The power of impeachment is with the House of Representatives, but only for impeachable offences. They are to proceed against the offence, but not to *create* the offence, and make any act criminal and impeachable at their will and pleasure. What is an offence is a question to be decided by the Constitution and the law, not by the opinion of a single branch of the legislature, and when the offence thus described by the Constitution or the law has been committed, then, and not till then, has the House of Representatives power to impeach the offender."

The honorable manager proceeds:

A civil officer may be impeached for a high crime. What is a crime? It is such a violation of some known law as will render the offender liable to be prosecuted and punished. "Though all wilful violations of rights come under the generic name of wrongs, only certain of those made penal are called crimes."

In another passage he says:

All that has been said herein concerning the term "crimes" may be applied with equal force to the term "misdemeanors," as used in the Constitution. The latter term in nowise extends the jurisdiction of the House of Representatives beyond the range of indictable offences. Indeed, the terms "crime" and "misdemeanor" are, in their general sense, synonymous, both being such violations of law as expose the persons committing them to some prescribed punishment; and although it cannot be claimed that all crimes are misdemeanors, it may be properly said that all misdemeanors are crimes.

Adopting that definition of the honorable manager, [Mr. Wilson,] the point which I endeavor to make in argument is, that the definition given by the honorable manager who opened the argument [Mr. Butler] is not a correct definition. That opening, as the Senate will remember, is accompanied by a very carefully prepared and elaborate argument on the part of Mr. Lawrence, who agrees in the following definition given by the honorable manager:

We define, therefore, an impeachable high crime or misdemeanor to be one in its nature or consequences subversive of some fundamental or essential principle of government, or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for any improper purpose.

If you go to the law of Parliament for a definition of "treason, bribery, or other crimes and misdemeanors," as I have already said, you will not find it. If you go to the law of Parliament for the purpose of ascertaining what is an impeachable offence, then you go to a law which is not in force in our country at all. Every species of offence which the Parliament chose to treat as such, whether it was declared by statute or not, was the subject-matter of impeachment by the Commons before the House of Lords. Their frame of government is different from ours. Persons were tried in England for very slight and very trivial offences, and very severe punishments were inflicted in various instances in the progress of English history upon the persons who were supposed to have been guilty of offences. This process of impeachment is such that we have no very accurate account of it in history, so far as I have been able to examine the authorities upon the subject. It is true, as the gentleman said, that nearly five hundred years ago the subject was introduced in the English Parliament, and that they considered it there and claimed that the House of Lords had jurisdiction over it in consequence of the law of Parliament; but how that law of Parliament arose, whence it originated, neither the House of Lords nor Mr. Burke in his elaborate report and argument in the House of Commons undertook to state. It arose from what they assumed to be usage; and if you go to the parliamentary law in order to determine that usage in this country, then you will be obliged to punish anything as an offence that might be said of any

person or of any authority whatever. In Stephen's History of the English Constitution, page 347, he says that—

The revival of impeachment is a remarkable event in our constitutional annals. The earliest instance of parliamentary impeachment or of a solemn accusation of any individual by the commons at the bar of the lords, was that of Lord Latimer, in the year 1376.

Which, as I understood the honorable manager's argument, is the period to which he refers.

The latest hitherto was that of the Duke of Suffolk, in 1449.

And, as the honorable manager told the Senate, he states that this practice of impeachment had for a long time given way to attainder. In the same work Mr. Stephen comments on Floyd's case as a proof of "the disregard which popular assemblies entertain for principles of justice when satiating their reckless appetites for revenge." He says, in describing Floyd's case, "that a few words spoken as to being pleased with the misfortunes of the Elector Palatine and his wife" were the offence which he had committed; and the punishment that was inflicted upon him was to ride from the Fleet to Cheapside without a saddle and holding by the horse's tail, two hours in the pillory, to be branded with the letter K in the forehead, another ride and pillory to be taken in four days, with the words on a paper in his hat showing his offence; that he was to be whipped at the cart's tail from the Fleet to Westminster Hall; that a fine of £5,000 and imprisonment for life at Newgate were imposed upon him.

If there be anything in the argument that you are to look to the parliamentary law for the definition of the phrase "high crimes and misdemeanors," and for the definition of impeachable offences, then an offence such as was attributed to him, or an offence such as was attributed to other parties afterwards who were tried for making speculations in the public revenue, would be the subject-matter of impeachment in this country; but, as I maintain, this is limited by the Constitution, and you can only look to the common law for the purpose of ascertaining the definition of crimes and misdemeanors. Mr. Story, I know, says in his work upon the Constitution that in one case it was settled in this country that the term "crimes and misdemeanors" did not have the signification which I insist upon; but at the same time in his treatise he asserts that there is a contrariety of opinion on the subject, one set of interpreters of the Constitution holding the doctrine to be one way, and another and a different set holding it to be a different way; and, as I understand him, he does not regard the question as being by any means finally and authoritatively settled. So then I recur to the proposition with which I set out, that in order to ascertain what are impeachable crimes and misdemeanors it is necessary to go to the common law for the definition, and when you go to the common law for the definition nothing is impeachable in this country within the meaning of the Constitution except a crime or misdemeanor known as such at the time when the Constitution was adopted. In other words, I respectfully maintain that Congress has no power to create a crime or misdemeanor in its nature different from crimes and misdemeanors as known and understood at the time of the adoption of the Constitution.

Feebly and imperfectly as this argument has been presented, I will not undertake to dwell upon it further.

I desire, although it is not exactly in the order which I had prescribed for my remarks, to call the attention of the Senate now to some observations made by the honorable gentleman who addressed the Senate yesterday, [Mr. Manager Boutwell,] and in order that there may be no misunderstanding as to the observations to which I desire to call your attention I will read a paragraph from the gentleman's speech of the day before yesterday:

The President is a man of strong will, of violent passions, of unlimited ambition, with capacity to employ and use timid men, adhesive men, subservient men, and corrupt men, as the instruments of his designs. It is the truth of history that he has injured every person

with whom he has had confidential relations, and many have escaped ruin only by withdrawing from his society altogether. He has one rule of life: he attempts to use every man of power, capacity, or influence within his reach. Succeeding in his attempts, they are in time, and usually in a short time, utterly ruined. If the considerate flee from him, if the brave and patriotic resist his schemes or expose his plans, he attacks them with all the enginery and patronage of his office, and pursues them with all the violence of his personal hatred. He attacks to destroy all who will not become his instruments, and all who become his instruments are destroyed in the use. He spares no one.

The particular sentence to which I desire to call your attention is in the close of that paragraph:

Already this purpose of his life is illustrated in the treatment of a gentleman who was of counsel for the respondent, but who has never appeared in his behalf.

It is to me, senators, a source of much embarrassment how to speak in reply to the accusation which has thus been preferred against the President of the United States. The honorable manager treats him as if he were a political leper, and as if his very touch would communicate contagion, and as if almost the very sight of him would produce death. But I respectfully insist that upon a statement of facts, which I will make to you in a moment, and which I deem to be called for by the accusation which he has made in reference to Judge Black, it will appear that injustice has been done, no doubt unintentionally, by the honorable manager, in the remarks which he has made. I regret that this topic has been introduced here; but, as it is brought forward, I must meet it I am not aware that I ever saw Judge Black in my life until I met him in consultation in the President's council chamber. In the few interviews which we had there our intercourse, though brief, was pleasant and agreeable; and it is with a feeling of embarrassment that, under those circumstances, I deem it necessary to say anything upon the subject at all. In order that you may understand what I have to say about it I desire to refer the Senate to a brief statement which I have prepared on account of the delicacy of the subject; and, although I have not had time to write it out as I would have desired to do, it will be sufficient to enable you to comprehend the fact which I am about to state. You will understand, senators, that I do not purport to give a full history of what I may call the Alta Vela case, as to which a report was made to the Senate by the Secretary of State upon your call. A mere outline of the case will be sufficient to explain what I have to say in reference to Judge Black.

Under the guano act of 1856, William T. Kendall on the one side, and Patterson and Marguiendo on the other, filed claims in the Secretary of State's office to the island which is claimed by the government of St. Domingo. (Report, pp. 2, 3.)

On the 17th of June, 1867, the examiner of claims submitted a report adverse to the claim for damages against the Dominican government. On the 22d of July, 1867, Mr. Black addressed a letter to the President, (page 10,) and another on the 7th August, 1867. On page 13 it is said that Patterson and Marguiendo acquiesce in the decision. On page 13 it is shown that other parties are in adverse possession. On page 15 it is asserted that the contest is between citizens of the United States, and can be settled in the courts of the United States. The contest now seems to be between Patterson and Marguiendo and Thomas B. Webster & Co. (Report, p. 15.)

On the 14th December, 1859, Judge Black, as Attorney General, rejected the claim of W. J. Kendall to an island in the Caribbean sea, called Cayo Verde, (page 24,) and Mr. Seward seems to regard the two cases as resting on the same principle in his report of 17th of January, 1867.

On the 22d July, 1867, Judge Black addressed a letter to the President enclosing a brief, (page 53.) On the 7th August, 1867, he addressed another communication to the President, (page 55.) On the 7th February, 1868, an elaborate and able communication was sent to the President, signed by J. W. Shaffer, attorney for Patterson & Marguiendo, and Black, Lamon & Co., of

counsel, in which they criticised with severity the report of Mr. Seward and asked the President to review his decision. (Report, p. 65.)

These citations are made from Executive Document No. 39, fortieth Congress, second session.

According to the best information I can obtain I state that *on the 9th March*, 1868, General Benjamin F. Butler addressed a letter to J. W. Shaffer, in which he stated that he was "clearly of opinion that, under the claim of the United States, its citizens have the exclusive right to take guano there," and that he had never been able to understand why the Executive did not long since assert the rights of the government and sustain the rightful claims of its citizens to the possession of the island *in the most forcible manner* consistent with the dignity and honor of the nation.

This letter was concurred in and approved of by John A. Logan, J. A. Garfield, W. H. Koontz, J. K. Moorhead, Thaddeus Stevens, J. G. Blaine, and John A. Bingham, on the same day, 9th March, 1868.

The letter expressing the opinion of Generals Butler, Logan, and Garfield was placed in the hands of the President by Chauncey F. Black, who, on the 16th March, 1868, addressed a letter to him in which he enclosed a copy of the same with the concurrence of Thaddeus Stevens, John A. Bingham, J. G. Blaine, J. K. Moorhead, and William H. Koontz.

After the date of this letter, and while Judge Black was the counsel of the respondent in this cause, he had an interview with the President, in which he urged immediate action on his part and the sending an armed vessel to take possession of the island; and because the President refused to do so Judge Black, on the 19th March, 1868, declined to appear further as his counsel in this case.

Such are the facts in regard to the withdrawal of Judge Black, according to the best information I can obtain. So far as the President is concerned, "the head and front of his offending hath this extent—no more."

It is not necessary to my purpose that I should censure Judge Black or make any reflection upon or imputation against any of the honorable managers.

The island of Alta Vela, or the claim for damages, is said to amount in value to more than a million dollars, and it is quite likely that an extensive speculation is on foot. I have no reason to charge that any of the managers are engaged in it, and presume that the letters were signed, as such communications are often signed, by members of Congress, through the importunity of friends.

Judge Black no doubt thought it was his duty to other clients to press this claim; but how did the President view it?

Senators, I ask you for a moment to put yourself in the place of the President of the United States, and as this is made a matter of railing accusation against him, to consider how the President of the United States felt it. I am willing that the facts in this case shall be spread not only before the Senate, but before the whole country, and that his enemies shall be the judges of the purity of his conduct and motives in regard to it.

There are two or three facts to which I desire to call the attention of the Senate and the country in connection with these recommendations. They are, first, that they were all gotten up after this impeachment proceeding was commenced against the President of the United States. Keep the dates in mind, and you will see that such is the fact. Every one of them was gotten up after this impeachment proceeding was commenced against him.

Another strong and powerful fact to be noticed in vindication of the President of the United States, in reference to this case which has been so strongly preferred against him, is that while I have not made, and will not make, any imputation whatever upon the honorable managers in the cause, these recommendations were signed by four of the honorable gentlemen to whom the House of Representatives have intrusted the duty of managing this great impeachment against him.

Digitized by Google

Now, let me present to you in my plain language a single idea, senators, in regard to this matter. If the President went to war with a weak and feeble power to gain the island, it would seem that he had done so in fear of the managers and in the fear of losing the highly valued services of Judge Black. If he failed to do the thing which he was called upon to do by his eminent and distinguished counsel, there was danger that he would exasperate Judge Black and his friends, and their influence would be turned against him on the trial. It was under these delicate circumstances that this petition was presented to the President of the United States. He was between Scylla and Charybdis. In forming his own determination, no matter which way it might be formed, his motives might be impugned and his integrity might be assailed; but they know little of the President of the United States, far less than your humble speaker knows, who imagine that they can force or drive or compel him, under any imaginable state of circumstances, to do what he believes to be wrong. He is a man of peculiar temperament and disposition. By careful management and proper manipulation he may, perhaps, be gently led; but it is a pretty difficult thing to do that. But with his temperament and his disposition, no man, no power under the heavens can compel him to go one inch beyond what he believes to be right; and although he knew that in rejecting this claim in the peculiar situation in which he was placed he might raise up enemies against him, although he was well aware that a powerful influence might be brought to bear against him in this trial, and that it would be trumpeted abroad from one end of the Union to the other that Judge Black had become disgusted with his cause and dissatisfied with it, and had deserted it and abandoned it on account of his full conviction of his guilt—although the President, I say, knew this, and although he knew that a black cloud would be raised against him, yet his feeling was that—

"Although that cloud were thunder's worst,
And charged to crush him—let it burst."

And he acted like a noble-hearted man, as he is; he acted like a sentinel placed, if I may so express myself, upon the watch-tower of the Constitution, faithful to the rights of the people who had exalted him to that lofty position; unmindful of self, regardless of consequences, he was determined not to do an act which he believed to be wrong. He was determined not to employ the whole power of the United States in a war against a little power down here that had no capacity of resistance. He was determined not, under these painful and difficult circumstances, to be used as an instrument in the hands of anybody, or any set of men under heaven, to carry on a speculation which he believed might be carried on with dishonor to the government, or with disgrace to himself if he consented to be concerned in it.

And I ask you, senators, to weigh his conduct; let the impartial judgment of the world look this statement of facts in the face, and pronounce upon it as you have to pronounce upon this impeachment; and when you come, in the cool moments of calm deliberation, to look over the President's conduct and these articles of impeachment that are preferred against him, I think you will find that, like the grave charge which was presented by the honorable manager the day before yesterday, these charges vanish away,

"And like the baseless fabric of a vision,
Leave not a wreck behind."

Such, I trust, senators, will be the result; such, I trust, will be the conclusion of this trial; and, although the President is now passing through the fiery furnace, although now every act and every motive of his public life is being investigated, yet he fears it not. He challenges the utmost scrutiny; he challenges the strongest investigation that may be made into his conduct; and while, as I said yesterday, he hurls no defiance at the Senate, and does not authorize me to say one word that will be offensive to his judges, yet he defies his enemies

now as he has always defied them; and he appeals to the purity and honesty of his own motives and of his own principles to shield him against this charge, as he does against every other of the charges that have been preferred. No, senators, instead of this being a matter of accusation against the President of the United States, in the view which I entertain of it, and in the view which I think every honorable and high-minded man will entertain of it, it will elevate him a head and shoulders taller than he ever stood before in the estimation of his friends; and it will be regarded as one of the proudest and noblest acts of his life that he could not be coaxed or driven to do what he believed to be wrong in the name of the government of the United States. This is preferred here as if the President had done some wrong to Judge Black. What wrong did he do? How did any pollution result from Judge Black's contact with him as counsel? Did he discard Judge Black and tell him he did not want him to appear as his counsel any more in the cause? No, sir; it was upon his own voluntary motion that he withdrew from the case. If the President of the United States has done him any injury the President knows it not; his counsel know it not; and I leave it to the judgment of the world to determine upon this statement how much of justice there is in the accusation which was so strongly made against him.

Senators, allow me to call your attention to another paragraph in the speech of the honorable manager who last addressed you. It is not my purpose or intention to undertake the duty at present of answering at length that able and carefully-prepared argument which the honorable manager has made. I must leave the notice of it to those who are to follow me in the argument on the side of the President. But there is another paragraph which reads in this language:

> Having indulged his cabinet in such freedom of opinion when he consulted them in reference to the constitutionality of the bill, and having covered himself and them with public odium by its announcement, he now vaunts their opinions, extorted by power and given in subserviency, that the law itself may be violated with impunity.

You remember how elegantly the honorable gentleman introduced the dialogue between Hamlet and Pollonius, when speaking upon this subject, and you may remember that he goes on and says:

> This, says the President, is the exercise of my constitutional right to the opinion of my cabinet. I, says the President, am responsible for my cabinet. Yes, the President is responsible for the opinions and conduct of men who give such advice as is demanded, and give it in fear and trembling lest they be at once deprived of their places. This is the President's idea of a cabinet, but it is an idea not in harmony with the theory of the Constitution.

And in another place, I believe, the gentleman spoke of the members of the cabinet being serfs:

> It was the advice of serfs to their lord, of servants to their master, of slaves to their owner.

I desire, senators, to refresh your recollection by reading a single paragraph from the message of the President of the United States which was put in evidence upon the side of the prosecution—the famous message dated December 12, 1867; and lest I should forget to present the idea to your consideration, I wish to state now, in reference to this message, as well as in reference to all other documents signed by the President of the United States which they have introduced upon the other side as evidence against him, that if any rule of law is to obtain in this high and honorable tribunal, when they put these documents in evidence before the Senate they make them, so to speak, their witnesses, and they cannot discredit them. They have not undertaken to discredit them at all. When we offered to introduce the members of the cabinet as witnesses to prove certain statements which were made by the President in these messages, the Senate refused to do so; and while at the moment I regretted the decision of the Senate, yet, upon sober, second thought, I was inclined to the opinion that the Senate had probably settled the question exactly right; that it was unnecessary for us to introduce the members of the cabinet, unnecessary for us to

introduce their testimony to sustain these statements, when these statements are not impugned in the slightest degree by any evidence which is offered by the other side. What does the President say in that message? I read from page 138 of the record of the trial:

This was not the first occasion in which Mr. Stanton, in discharge of a public duty, was called upon to consider the provisions of that law. That tenure-of-office law did not pass without notice. Like other acts, it was sent to the President for approval. As is my custom, I submitted its consideration to my cabinet for their advice upon the question whether I should approve it or not. It was a grave question of constitutional law, in which I would of course rely most upon the opinion of the Attorney General and of Mr. Stanton, who had once been Attorney General.

Now, you see, to use the elegant word of the honorable manager on the other side, he calls these serfs around him to see what these serfs will say in reference to the constitutionality of the law which he has under consideration:

Every member of my cabinet advised me that the proposed law was unconstitutional. All spoke without doubt or reservation; but Mr. Stanton's condemnation of the law was the most elaborate and emphatic. He referred to the constitutional provisions, the debates in Congress, especially to the speech of Mr. Buchanan when a senator, to the decisions of the Supreme Court, and to the usage from the beginning of the government through every successive administration, all concurring to establish the right of removal as vested by the Constitution in the President. To all these he added the weight of his own deliberate judgment, and advised me that it was my duty to defend the power of the President from usurpation, and to veto the law.

There is in the "plain, unvarnished" statement of the President of the United States, uncontradicted by any witness called here, a statement that we offered to verify by the introduction of the members of the cabinet as witnesses. We offered to prove every word, at least the substance of every word, that is contained in that paragraph of the message, and had the members of the cabinet here, and were ready and willing to put them upon oath; but their testimony was not admitted; and so, in view of the two things, first that this message was offered in evidence upon the side of the prosecution, and second that we offered to prove the truth of the statements contained here, I assume as an indisputable fact in the case that Mr. Stanton, about whom the whole world seems to be set on fire now, did give to the President the advice that this civil-tenure bill, about which such a great cry has been raised in the land, was an unconstitutional law, and that it was his duty to veto it. While I never saw Mr. Stanton to my knowledge, and have no sort of personal acquaintance with him, I think that if I were in his place I should exclaim, as somebody exclaimed—I forget who it was, but I know these honorable senators will remember it a great deal better than I do—"Save me from my friends, and I will take care of my enemies." I think if ever a man on the face of the earth had reason to exclaim "Save me from my friends," Mr. Stanton has reason to exclaim "Save me from the description which is given here of a cabinet officer, and of the mean, low, debasing, mercenary motive by which a cabinet officer is supposed to act." But this is a sort of family quarrel, and I shall not undertake to interfere in it.

One other thing in this connection about Mr. Stanton. Mr. Stanton as one of the President's cabinet advised him to veto the civil-tenure-of-office bill; but before Mr. Johnson became President, Mr. Stanton placed on record an opinion, which I think it proper for me to read under existing circumstances, and it is an opinion which does not stand in the category of the action of Mr. Stanton as one of the members of President Johnson's cabinet. On the 3d of March, 1865, Mr. Stanton addressed the following letter to "His Excellency Andrew Johnson, Vice-President elect:"

WAR DEPARTMENT, *Washington City, March* 3, 1865.

SIR: This department has accepted your resignation as brigadier general and military governor of Tennessee.

Permit me on this occasion to render to you the thanks of this department for your patriotic and able services during the eventful period through which you have exercised the high trusts committed to your charge.

Digitized by Google

In one of the darkest hours of the great struggle for national existence against rebellious foes the government called you from the Senate, and from the comparatively safe and easy duties of civil life, to place you in the front of the enemy, and in a position of personal toil and danger, perhaps more hazardous than was encountered by any other citizen or military officer of the United States.

With patriotic promptness you assumed the post, and maintained it under circumstances of unparalleled trial, until recent events have brought safety and deliverance to your State and to the integrity of that constitutional Union for which you so long and so gallantly periled all that is dear to man on earth.

That you may be spared to enjoy the new honors and perform the high duties to which you have been called by the people of the United States is the sincere wish of one who, in every official and personal relation, has found you worthy of the confidence of the government and the honor and esteem of your fellow-citizens.

EDWIN M. STANTON,
Secretary of War.

His Excellency ANDREW JOHNSON, *Vice-President elect.*

Mr. Chief Justice and Senators, but three short years have elapsed since that letter of indorsement was written by Mr. Secretary Stanton to the present President of the United States; and I read it for a twofold purpose: first, to show that when I spoke to you yesterday in regard to the services of the President of the United States in behalf of the Union I did speak the words of truth and soberness; and I show you, out of the mouth of Mr. Stanton himself, that he deserved all the encomiums which I endeavored to pass upon him in the progress of my remarks yesterday for his faithful devotion to the Union, and for having exposed himself in the hour of danger in its behalf; and, second, to show that in three short years it is scarcely possible, in the nature of things, that the President of the United States should be so suddenly changed as they insist he is in behalf of the prosecution. It is hardly conceivable that in a period of three short years a gentleman of whom the Secretary of War spoke in the highest terms of commendation which I have read should become the monster, the tyrant, the usurper, the wicked man that he is represented to be upon the other side. Mr. Stanton runs through the whole trial; his name is almost everywhere. Mr. Stanton's name is, at least substantially, embodied in the charges that are contained in these articles. Here you have Mr. Stanton in two positions indorsing the President of the United States; first, when he ceased to hold the office of military governor of Tennessee and was elevated to the high position of Vice-President elect, you have him saying—

That you may be spared to enjoy the new honors and perform the high duties to which you have been called by the people of the United States is the sincere wish of one who in every official and personal relation has found you worthy of the confidence of the government and the honor and esteem of your fellow-citizens.

That is Mr. Stanton's indorsement in 1865; and then you have Mr. Stanton's act as one of the President's advisers when the civil-tenure bill was passed in February, 1867. You have him then indorsing the action of the President in both forms up to the time that the civil-tenure bill was passed; and if a difference of opinion afterward grew up between them, if unkind feelings existed between them, if there was a loss of confidence on the part of the President, and if their relations toward each became less harmonious than they had been before, all that I have to say about it is that it furnishes no ground of impeachment that should in the slightest degree affect his character or his motives.

There is one other thing, before I come to the consideration in detail of the various articles of impeachment, that I desire, senators, to call your attention to, and that is to this same proceeding which was had in the House of Representatives upon the subject of impeachment. I know not how it has struck the minds of senators; I know not how it has impressed the minds of the people of the United States; but one of the strangest anomalies in the political history of our government is that these articles of impeachment should have been gotten up against the President of the United States after twelve months' examination, and that some of the leading charges against him, of which I will speak after

awhile should be founded upon acts which were done in reference to the 39th Congress. If the President of the United States is the guilty culprit that they represent him to be on the other side, if he has defamed and slandered Congress if he has done acts which are worthy of impeachment, is it not passing strange that the thirty-ninth Congress took no notice of them, and that after that Congress is defunct, after it has passed out of existence, after its name and its memory have gone into history, another Congress should take up offences against that Congress and make them matter of grave accusation against the President of the United States? I will read one of the charges investigated by that Congress. This is rather by anticipation and a little out of the order that I had designed; but as I have the book before me I will read it now. One of the grounds of accusation then presented against him by the committee in the House of Representatives—and they had seventeen of them—the last of the file was this:

> That he has been guilty of acts calculated, if not intended, to subvert the government of the United States, by denying that the thirty-ninth Congress was a constitutional body, and fostering a spirit of disaffection and disobedience to the law and rebellion against its authority, by endeavoring, in public speeches, to bring it into odium and contempt.

I have in my possession the actual vote which was taken in the House of Representatives upon the subject. My memory may fail me; I may have been misinformed about it; but I have been informed and believe, and you know much better than I do how the fact is, that the House of Representatives, by a considerable majority, refused to entertain these accusations as ground of impeachment against the President of the United States by a solemn vote. And if there were any law in this tribunal (and the gentlemen say there is not unless it be that mysterious and wonderful law of Parliament which they rely upon, and which after all the definitions they give to it amounts at last to no law at all) or any application by analogy of the principles of law, I would avail myself of the doctrine of estoppel which was so learnedly insisted upon by one of the honorable managers on the other side, and I would insist, with all due deference and respect, that the House of Representatives, after having voted down this charge that the President of the United States had slandered and maligned the thirty-ninth Congress, was estopped from making any accusation of that kind against the President now.

But I hope I may say without offence, and before proceeding to notice some of the charges more specifically that have been preferred here, that I think the Senate of the United States, sitting as a judicial tribunal, can look to the circumstances under which these charges are preferred without any disrespect whatever to the House of Representatives; and when you come to look at the circumstances under which these charges were preferred, after the President of the United States had been virtually acquitted in the House of Representatives, you have at least evidence that it was done without any great amount of deliberation in the House, possibly under the influence of that excitement which legislative assemblies as well as individuals are liable to; and that very circumstance, without imputing any wrong or improper motive to the House of Representatives, is one to which I maintain that this Senate, this assembly of grave and reverend seniors, who are impanelled, as it were, here under the Constitution to try these articles of impeachment, may look with propriety—for they do not come before you, senators, like those articles which were preferred against Warren Hastings in England, and which were the subject of long and earnest debate in the House of Commons before they were presented. They were prepared in hot haste after the President had removed Mr. Stanton; they were passed upon very brief debate in the House of Representatives, and thus they come here. If the House has acted, as I hope it has, hastily, senators, it is your province and your duty, as I maintain most respectfully, to look to that fact, and not to give the same importance to accusations made under such circum-

stances as you would to those which were made under more careful deliberation, and especially when the House of Representatives, but a very short time before, had acquitted the President of a large number of the charges which were preferred against him in the able and ingenious report presented by its judiciary committee. Surely, under these circumstances, it will be no disparagement of the House, it will be no disparagement to you to look to the fact that these charges were hastily presented, and if, upon sober review here, you should believe that these charges come to you in at least a questionable shape, so far as the swift circumstances under which they were adopted are concerned, it will be no reflection upon the House any more than it would upon an individual. I trust that, as the House of Representatives is composed of men, at least men of flesh and blood like yourselves, it will be no disparagement to them to say that even a House of Representatives, composed of honorable men, acting under the impulses of feeling, and acting hastily and without any great amount of deliberation, acting, as it were, in passion, may do a thing which, upon "sober second thought," they would not do over again. We all know human nature well enough, at least in our own persons and in our own characters, to know that when we act in passion, when we act in haste, when we act in excitement, we are apt to do things which, upon reflection, we have reason to regret; and those actions, while they are in a great measure excusable, on account of the haste and passion in which they are committed, are yet actions which do not command the same power and influence in society that they would do if they were the result of grave and careful and deliberate and mature consideration.

Now, senators, I shall have to call your attention to the articles of impeachment somewhat in detail; and though it is rather a disagreeable duty to tread this mill horse round, to go to these articles of impeachment and take them up one by one and make brief comments on them, as it is my purpose to do; though I know that the subject is becoming stale and weary, not only to the Senate, but to those who gathered around to hear this investigation; yet I cannot, in accordance with my sense of duty in this case, take my seat until I offer some considerations to the Senate on each one of the articles of impeachment. Although it must necessarily be to some extent a tedious business, yet I do so because, senators, if you follow the precedents which we have had in other cases, you will be required to vote upon each one of the articles of impeachment separately, and you will have to form your judgment and opinion upon each in a separate way.

In regard to the first article of impeachment it may not be out of place to look to that article as it is presented, and to state very briefly the article itself and the answer to it. I do not propose to go through all the verbiage of that article, nor to repeat in detail all the facts stated in the answer; but the article charges in substance that on the 21st of February, 1868, the President unlawfully issued an order for the removal of Edwin M. Stanton, without saying anything in this part of the article about the Senate being or not being in session. It alleges that on the 12th of August, 1867, during the recess of the Senate, he suspended Mr. Stanton; that on the 12th of December, 1867, and within twenty days after the meeting of the Senate, he reported the suspension and his reasons, and that the Senate refused to concur in the suspension; that Stanton, by virtue of the act "regulating the tenure of certain civil offices," forthwith resumed the office; and that on the 21st of February, 1868, the President issued the order of removal to Stanton, and that this was done, first, in violation of the "act regulating the tenure of certain civil offices," passed March 2, 1867; and second, in violation of the Constitution, and without the consent of the Senate, then in session; and that it was a high misdemeanor in office.

Without going into all the details the answer substantially states that Mr. Stanton was appointed Secretary during pleasure by Mr. Lincoln on the 15th of January, 1862; that the office was created by the act passed on the 7th of

Digitized by Google

August, 1789; that Stanton became one of the advisers of the President and subject to his general control; that the respondent succeeded to the Presidency on the 15th of April, 1865, and Mr. Stanton continued to hold the office; that the respondent being satisfied that he could not let Mr. Stanton continue in office without detriment to the public interest, he decided to suspend him on the 5th of August, 1867. The invitation to Mr. Stanton to resign his office is set out in the answer; also his reply declining to do so. It is further stated that the respondent required and acted upon the opinion as to the civil tenure-of-office act of each principal officer of the executive departments; that this action was made known to the Senate on the 2d of March, 1867; that although he believed the tenure-of-office act was void, the respondent, in his capacity as President, formed the opinion that Stanton's case was in fact excluded by the first section; that notwithstanding respondent's opinion on that subject, he was anxious that Stanton's removal should be acquiesced in by the Senate or that the question should be judicially determined; that the right of suspension is provided for by the tenure-of-office law in the second section, and that Mr. Stanton was not suspended until the next meeting or action of the Senate, but indefinitely and at the President's pleasure; that a vacancy thus existing General Thomas was appointed *ad interim* under the act of 13th February, 1795; that the purpose to obtain a judicial decision was made known at or near the date of this order; that, not intending to abandon his rights as President, but anxious to avoid any question, the respondent did send his message to the Senate on the 12th of December, 1867; that his hopes not being realized, the respondent, in order to raise the question for judicial decision, and to that end only, issued the order removing Stanton and appointing Thomas *ad interim* on the 21st of February, 1868. There is besides an answer to each specific allegation.

Now, senators, allow me to present one thought before entering upon the consideration of this first article, which, as I conceive, is applicable to all the articles; indeed, much of what we have to say upon the first article applies to all the other articles, and it involves, to some extent, a necessary repetition to consider them in detail, but I shall endeavor, as far as I can possibly do so, to avoid such repetition.

All the articles of impeachment, or nearly all of them, charge a removal. One of the managers spoke a good deal, and very much to the purpose, upon the subject of technical law. I did not understand the gentleman as making any objection to it. He regarded it as a proper means of enforcing the rights of parties and as a legitimate portion of legal science. Well, although I know that technical rules are not to be observed in this Senate, if you follow the precedents of trials of impeachment which we have already had in the United States, and especially if you follow the decisions in the British Parliament, yet there ought to be something at least substantial in the articles that are preferred against a man. Now, what is it that is provided for by the civil-tenure bill? Before I come to consider that bill at all in its details, let me ask what is provided for there? It is the removal of a person; and that is the thing which is charged in each one of what I may, for want of a better word, call the counts of this indictment, each one of the articles that is preferred here. Senators, if you follow the law and the rules of law that have been adopted in other cases, if, at any rate, you look to them as being a guide to some extent, although not binding and obligatory to all intents and purposes as judicial decisions, what is a familiar rule of law? There is not a judge or a lawyer in this Senate who does not know that in every law-book which has been written in 200 years a distinction is taken between a crime and an attempt to commit a crime. The distinction is just as broad and as wide as Pennsylvania avenue. According to statutory regulations almost everywhere, and even according to the common law, murder is one thing, an attempt to commit murder is another and a dif-

Digitized by Google

ferent thing; burglary is one thing, an attempt to commit that offence is another and a different thing.

Now, I ask, and I ask in all earnestness, of this Senate as lawyers and judges, when these articles of impeachment charge the President with the removal of Mr. Stanton is it not a solecism in language that they should ask this Senate on their oaths to say that the President of the United States is guilty of a violation of the civil tenure bill, or guilty of either of the offences that are charged here? That there was an attempt to remove there is no sort of question; but if the doctrine contended for by the learned managers be the true doctrine, if this civil-tenure bill be a constitutional law, as they insist it is, if the President has no power to remove except on the advice and consent of the Senate of the United States, then, senators, I ask you how is it that he can be found guilty of removing Mr. Stanton from office, taking the premises of the honorable gentlemen to be correct, when there was no removal at all? If their doctrine be the true doctrine, there was no removal from office at all; you do not bring it within the civil-tenure bill unless you have a case of removal, and even under the civil-tenure bill it is not a case of removal; but if either construction be the true one it is a case of an attempt to remove a person from office; so that it seems to me it is utterly impossible for the honorable managers to escape the dilemma in which the nature of their accusation places them.

Upon the first article, Mr. Chief Justice and Senators, I desire to maintain briefly three propositions:

1st. That the tenure-of-office bill is unconstitutional and void. Gentlemen have intimated a doubt whether the Senate ought to hear any argument upon that subject, but for the reasons indicated yesterday that a court at *nisi prius* would hear an argument on a rule for a new trial, or that a chancery court will allow a bill of review on a petition for a rehearing, while I do not intend to argue the question at any great length, I respectfully ask the Senate to hear what we have to say on this subject, as it is material and important to our defence.

2d. That if the civil-tenure bill is not constitutional, it does not embrace such a case as the removal of Mr. Stanton.

3d. That if both these propositions are erroneous, the President acted from laudable and honest motives, and is not, therefore, guilty of any crime or misdemeanor.

Upon the first proposition as to the unconstitutionality of the civil-tenure act, as it has not been done already in behalf of the President of the United States, I feel myself constrained to remind you of certain things which occurred in the debate of 1789. Although I know they are familiar probably to every senator I address, yet I regard these things as material and important to our defence, and at the expense of telling "a thrice-told tale," and of wearying the patience of the honorable Senate, I must ask the privilege of presenting as briefly as I can the views which I entertain upon that subject.

In the House debate which occurred on the 16th of June, 1789, on the bill to establish the department of foreign affairs, Mr. White moved to strike out the words "to be removable from office by the President of the United States." He advocated this because the Senate had the joint power of appointment. His views were sustained, as you recollect, in that argument, by Messrs. Smith of South Carolina, Huntington, White, Sherman, Page, Jackson, Gerry, and Livermore, and were opposed by Messrs. Vining, Madison, Boudinot, and Ames, as is seen in Gales & Seaton's Debates in Congress, old series, volume one, page 473 to 608. Mr. Madison said in that debate:

> It is evidently the intention of the Constitution that the first magistrate should be responsible for the executive department; so far, therefore, as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to his country.

Digitized by Google

He placed the discussion mainly on the constitutional provision that—

The executive power shall be vested in the President.—*Ibid.*, 481.

Mr. Sedgwick said:

If expediency is at all to be considered, gentlemen will perceive that this man is as much an instrument in the hands of the President as the pen is the instrument of the Secretary in corresponding with foreign courts. If, then, the Secretary of Foreign Affairs is the mere instrument of the President, one would suppose, on the principle of expediency, this officer should be dependent upon him. It would seem incongruous and absurd that an officer, who, in the reason and nature of things, is dependent on his principal and appointed merely to execute such business as is committed to the charge of his superior, (for the business, I contend, is committed solely to his charge,) I say it would be absurd, in the highest degree, to continue such person in office contrary to the will of the President, who is responsible that the business be conducted with propriety and for the general interests of the nation.—1 *Debates in Congress, old series*, 542.

In that same debate, Mr. Sedgwick seems to have anticipated just such a state of affairs as existed between the President and Mr. Stanton. A part of Mr. Sedgwick's remarks is copied in one of the President's messages to Congress, but I desire to read the whole paragraph from which the President, in his message, took the extract that was submitted to Congress. He discussed the subject in an admirable and unanswerable manner. And when you keep it in mind, as has been, I believe, already stated in argument, that this debate was had soon after the adoption of the Constitution, that several gentlemen who had participated in the formation of the Constitution were members of Congress, and among them Mr. Madison, one of the ablest writers who ever wrote upon that subject, not even excepting Alexander Hamilton himself; when you take it into consideration that this discussion was at that early period and by persons who were concerned in the formation of the Constitution itself, the opinions which they expressed are deserving of the very highest consideration. And if there be anything in the doctrine of the law which is applied to every other case; if there be anything in the idea that when a decision upon a legal question is once made that decision should stand; if there be anything in the doctrine of *stare decisis*, then, senators, I maintain that an opinion which, so far as I know anything of our history as a government, has never been seriously controverted at any time except during the administration of Jackson, and the decision of which at that time was in favor of the view that we entertain now, is to be considered as entitled to respect. If an opinion that was acquiesced in for nearly eighty years is not an authority to a man for doing an act, then I can conceive of nothing that is sufficient authority.

If, according to the English law, a man would be protected in an action as to real property by sixty years' possession, if, according to the statute law of the State in which I reside, seven years' adverse possession under a color of title would give him an absolute title to his tract of land, if these healing statutes which have been passed from time to time, both in England and in our own country, and which are intended for the repose of society to secure titles to property, are administered every day, as they are, I presume, in all the courts of the United States, why may we not argue, and argue with propriety before the American Senate, that when a question was settled eighty years ago, and when the decision was never controverted until the present time except on the occasion to which I have referred, the conclusion at which Congress then arrived is upon principle binding and obligatory upon this Senate, and that you should follow it upon the same principle that the judges are in the habit of following judicial determinations in regard to the rights of property that have been long acquiesced in and have become rules of law.

If Mr. Sedgwick had been a prophet, if he had been Daniel, or Isaiah, or Jeremiah, or any one of the old prophets, and had undertaken to describe the difference between the President of the United States and Mr. Stanton, he could

Digitized by Google

not have done it better than he has done in the language which I am about to read to you:

The President is made responsible, and shall he not judge of the talents, ability, and integrity of his instruments? Will you depend on a man who has imposed upon the President and continue him in office when he is evidently disqualified unless he can be removed by impeachment? If this idea should prevail—which God forbid—what would be the result? Suppose, even, that he should be removable by and with the advice and consent of the Senate, what a wretched situation might not our public councils be involved in? Suppose the President has a Secretary in whom he discovers a great degree of ignorance, or a total incapacity to conduct the business he has assigned him; *suppose him inimical to the President*——

There Mr. Stanton looms right up, and he is the very man that this political prophet had in his mind when he was making this argument before the House of Representatives:

Or suppose any of the great variety of cases which would be good cause for removal, and impress the propriety of such a measure strongly on the mind of the President, *without any other evidence than what exists in his own ideas* from a contemplation of the man's conduct and character, day by day, what, let me ask, is to be the consequence if the Senate are applied to? If they are to do anything in the business, I presume they are to deliberate, because they are to advise and consent. *If they are to deliberate, you put them between the officer and the President*——

Just as the managers of the impeachment and the impeachment itself are attempting to do in this case:

They are then to inquire into the causes of removal; the President must produce his testimony. How is the question to be investigated? Because, I presume, there must be some rational rule for conducting this business? Is the President to be sworn to declare the whole truth and to bring forward facts; or are they to admit suspicion as testimony; or, is the word of the President to be taken at all events? If so, this check is not of the least efficacy in nature.

And then Mr. Sedgwick goes on with this paragraph, which is quoted in the message to which I have referred:

But, if proof be necessary, what is then the consequence? Why, in nine cases out of ten, where the case is very clear to the mind of the President that the man ought to be removed, the effect cannot be produced, because it is absolutely impossible to produce the necessary evidence. Are the Senate to proceed without evidence? Some gentlemen contend not. Then the object will be lost. *Shall a man, under these circumstances, be saddled upon the President*, who has been appointed for no other purpose but to aid the President in performing certain duties? Shall he be continued, I ask again, against the will of the President? If he is, where is the responsibility? Are you to look for it in the President, who has no control over the officer, no power to remove him if he acts unfeelingly or unfaithfully? Without you make him responsible, you weaken and destroy the strength and beauty of your system. What is to be done in cases which can only be known from a long acquaintance with the conduct of an officer?

Never did more sensible remarks proceed from the lips of mortal man than the observations which I have read in your hearing, senators, and which are just as descriptive as it is possible for language to be of the circumstances under which the removal of Mr. Stanton occurred. This is extracted from the same authority, 1 Debates in Congress, old series, page 543.

Now, I ask your special attention to the next step. Mr. Benson, of New York, moved to amend by inserting in place of the words "to be removable from office by the President of the United States" the words "that the chief clerk, whenever the said principal officer shall be removed from office by the President of the United States, as in any other case of vacancy, shall, during such vacancy, have the custody and charge of all records, books, and papers." This was carried by a vote of yeas 30, nays 18. (1 Debates, old series, 601 602, 603.)

Mr. Benson now moved (page 604) to strike out of the first clause the words "to be removable by the President;" which was carried—yeas 31, nays 19.

The honorable manager who opened the cause made an argument, as I remember—I shall not take time to turn to it—that this debate occurred in Committee of the Whole, and that what transpired in the House is not shown in any

report of the debates. If that be so, does it in the slightest degree affect the force and validity of the argument itself? Is it not to be presumed that the very same men who had adopted this principle in Committee of the Whole would, when they came to act in the House proper, vote under the same views which they had expressed in committee?

Mr. Benson said that his objection to the clause arose from an idea that the power of removal by the President hereafter might appear to be exercised by a legislative grant only, and consequently be subjected to legislative instability, when he was well satisfied in his own mind it was fixed by a fair legislative construction of the Constitution. (*Ibid,* 603.)

Mr. Madison's reasons for sustaining the motion to strike out were, "First, altering the mode of expression tends to give satisfaction to those gentlemen who think it not an object of legislative discretion; and second, because the amendment already agreed to fully contains the sense of this house upon the doctrine of the Constitution, and therefore the words are unnecessary as they stand here."

Now indulge me, if you please, while I call your attention and refresh your recollection by the remarks of Chancellor Kent upon this general subject. He quotes the following words from the act creating the Treasury Department: "That whenever the Secretary shall be removed from office by the President of the United States, or in any other case of vacancy," &c., and says, "This amounted to a legislative construction," &c., as quoted by the President in his message; and Kent continues:

> This question has never been made the subject of judicial discussion, and the construction given to the Constitution in 1789 has continued to rest on this loose, incidental, declaratory opinion of Congress and the sense and practice of the government since that time.

You see, from these remarks, that Chancellor Kent, if the question had been presented to him as an original question, if he had been called upon to determine it as a judge, would have said that he thought this construction rested on ground altogether too loose to justify him as a judge in giving that opinion; but what does he say as to the effect of the settlement thus made? He says:

> It may now be considered as firmly and definitely settled, and there is good sense and practical utility in the construction. (Kent's Commentaries, p. 310.)

Part of this is quoted by the President, part of it is not; but I read you the whole paragraph. Judge Story, in his Commentaries, volume three, section fifteen hundred and thirty-seven, says:

> The public, however, acquiesced in this decision; and it continues, perhaps, the most extraordinary case in the history of the government of a power conferred by implication on the Executive by the assent of a bare majority of Congress, which has not been questioned on many other occasions.

That much is quoted in the President's message. But what does Judge Story say further in the same connection and in the same paragraph?

> Even the most jealous advocates of State rights seem to have slumbered over this vast reach of authority, and have left it untouched as the neutral ground of controversy, in which they desired to reap no harvest, and from which they retired without leaving any protestations of title or contest.

It will thus be seen that although the Federalist opposed the power of removal, Mr. Madison and Judge Story and Chancellor Kent regarded it as firmly settled and established; and now, senators, if authority is worth anything, if precedent is worth anything, if the opinions of two of the ablest judges we ever had in this country are worth anything, I maintain that it follows inevitably that the civil tenure bill is unconstitutional, and that the President was justified in exercising his veto power against it.

Whether, however, that view of the case be correct or not, there is still another view of it. If the President were wrong; if he were erroneously advised by his cabinet; if he came to an improper conclusion; if the view which was taken

Digitized by Google

by Congress on this subject were the correct view, still this argument is pertinent and appropriate as to the question of intention, because, as I have already said, in each of these articles an unlawful intention is charged against the President of the United States; and upon whose opinions, I respectfully ask, could this Senate, sitting as judges, rely with greater confidence than upon the opinions of two of the most eminent jurists that our country has ever produced, Kent and Story? They are names familiar to every judge and every lawyer in the United States as household words; and not here alone are these names distinguished. Far across the sea, in Westminster Hall, in that country from whence we borrowed our laws, the names of Kent and Story are almost as familiar as they are in the chamber where his honor presides as Chief Justice of the United States. Their works are quoted by British judges, by British lawyers, and by text-writers, and no two names in English or American jurisprudence stand higher than the names of these two distinguished citizens of our country. If they are not a sufficient authority to settle in the mind of the Senate, as they probably would not be in view of your action hitherto on the subject, that the law is unconstitutional, yet I ask you, senators, if the advice of two such distinguished men as these might not well guide the action of the President of the United States, and relieve him from the criminality which is imputed to him in these articles of impeachment?

I hope you will allow me, senators, to call your attention to some other opinions than these. This subject of appointments to and removals from office has been a matter of investigation in various forms by Attorneys General of the United States. The learned manager who opened the cause was well aware of this; and how did he meet it? Nobody is more astute than him in the management of a cause. I will do him the justice to say that, although I do not exactly agree with him in his notions about decency and propriety of speech, I have not seen a gentleman in my life who manages a cause with more skill and art and ability than he has managed this prosecution from the very commencement of it. With that astuteness for which he has distinguished himself in the investigation of this cause, when he came to speak of the opinions of the Attorney General he made use of an observation to this effect—I shall not undertake to quote him literally—that after that office had become political he did not consider it a matter of any very great importance to quote the opinions of its incumbents. I had a slight suspicion—I hope the gentleman will forgive me if it were an erroneous one—that possibly the authority of the Attorneys General might not be just exactly the kind of authority he wanted; and so, although I did not know much about the subject, and had never had occasion to examine the opinions of the Attorneys General, I concluded that I would look into them, and I find several opinions there to which I wish to call your attention.

Before I do this let me invite you, senators, to consider the provisions in the Constitution of the United States that the President may require the opinion in writing of the principal officers of each of the executive departments upon any subject relating to the duties of their respective offices, and to the act of September 24, 1789, which provides that the Attorney General shall give his advice upon questions of law when required by the President. It may be that I place an exaggerated construction upon this provision of the Constitution and upon the act of 1789. It will be for you as judges to decide how that is. I will state my proposition before I read the section *in extenso*, and I will state it in such manner as to direct your attention to the point which I am endeavoring to demonstrate.

I maintain, in view of the proper construction of the act of 1789, that it is a matter of perfect indifference whether the President of the United States is advised by the particular Attorney General who may belong to his cabinet in reference to a particular act or not. I maintain that the opinions delivered by the Attorney General are in the nature of judicial decisions. I do not say that

they are to all intents and purposes judicial decisions; but, in the view which I entertain of the act of 1789, I insist that they should be as operative and effectual in this high and honorable court as a judicial decision of respectable authority would be in the court over which your honor usually presides. Why do I say so? I will tell you. Unless I have misread the Constitution of the United States there is no provision there declaring that the decisions of the Supreme Court of the United States shall be final and conclusive and authoritative upon questions of law. There is no such provision in the Constitution; if there is, it has escaped me. The framers of the Constitution assumed that there was a certain state of things at the time they made it. They assumed that the history of the world would be before the country. They assumed that the history of English jurisprudence would be known or could be known to American citizens. In other words, they assumed that there was and would continue to be a certain amount of knowledge and information in the world, and therefore that it was not necessary for them to provide in the Constitution that the decisions made by the members of the Supreme Court of the United States should be binding upon their successors in office. They knew just as well as you know that the practice of English judges had been for centuries to regard a decision by a judicial tribunal in a case carefully considered, and especially in a case that had continued for any length of time, as an authority from which it was not safe in the administration of the law to depart.

Now, the argument I make before you is, that as the Constitution of the United States does not specify that the decision of the judges shall have all the binding force of authority in the land—and yet it has that force—this act of Congress, although it does not say so in reference to the opinions of the Attorneys General any more than the Constitution does in reference to the decisions of the judges of the Supreme Court of the United States, yet, upon any fair construction, upon any legal intendment, under this act of 1789, the opinion of the Attorney General may be regarded by the President, and by all others who have anything to do with that opinion, as a valid authority, and that it is sufficient to justify his action in any given case that may be covered by that opinion.

What is the provision of the act of September 24, 1789, section 35? (1st volume Statutes at Large, page 93, and 1st volume of Brightly's Digest, page 92.) It is provided by that section—

> That there shall be appointed an Attorney General for the United States, who shall be sworn or affirmed to a faithful execution of his office, whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinions upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments touching any matters that may concern their departments, &c.

When you take the two provisions together—first, the provision of the Constitution that the President may call upon the principal officer in each executive department for advice and opinion; and second, the provision of the act of 1789 that he may call upon this officer of the law, the Attorney General, for advice and opinion—I maintain that when that advice and opinion are given they are, by virtue of the Constitution and the law, binding upon the President of the United States; and that even if they were not given in reference to the particular removal of Mr. Stanton, yet if they were given in any case on all fours with his, if they were given in any similar case, these opinions are in the nature of judicial opinions, and they are a perfect shield and protection to the President, if I can bring his act in this particular case within the spirit and meaning of any of them. Now, without commenting on these opinions, or detaining the Senate by reading them at length, I will present a few without comment; for if I were to undertake to comment upon each opinion as to the power of appointment and the power of removal, it might take up more time than would be advisable. Trusting to and believing in the intelligence and discrimination of the Senate, I

Digitized by Google

will give them the substance of the positions assumed, as I understand, by the different Attorneys General who have given their opinions upon the question.

In the first volume of the Opinions of the Attorneys General, page 631, it will be seen that General Swartwout's commission (under the act of May 15, 1820, to limit the tenure of certain offices) as navy agent at New York expired during the preceding session of the Senate, and Mr. Wirt, Attorney General, gave an opinion, on the 22d of October, 1823, addressed to the Secretary of the Navy, in which he held that the words in the Constitution, "happen during the recess of the Senate"—and this, I think, will be a good answer to a portion of the argument offered by the honorable manager who spoke yesterday—are equivalent to the words "happen to exist," and that "the President has power to fill during the recess of the Senate, by temporary commission, a vacancy that occurred by expiration of a commission during a previous session of that body."

In the same volume, page 213, will be found another opinion of Mr. Wirt. The register of wills held his office under a commission during the pleasure of the President. Mr. Wirt in his opinion, delivered on the 15th of June, 1818, held that where an act of Congress gives the President the power to appoint, without designating the tenure by which the office is to be held, it is during the pleasure of the President. That is the advice and opinion of one of the most eminent lawyers, and one of the most gifted orators, that ever lived in the United States. He says:

> If the President had no right to issue such a commission, the commission is void, the office vacant, and the President has now a right to commission another person anew. If, on the contrary, the President had the right to issue such a commission, he has on the face of that commission the power of removal and the authority to reappoint.

In the second volume of Opinions of Attorneys General, page 333, will be found an opinion of Mr. Berrien, given on the 2d April, 1830, in which he held that—

> The appointment of a navy agent during the recess of the Senate, made in the case of a vacancy occurring during the recess, is in the exercise of the constitutional power of the President, and not by force of the act of 3d March, 1809; and the constitutional limitation of such appointment is to the end of the succeeding session of Congress, unless it be sooner determined by the acceptance of a new commission, made under an appointment by and with the advice and consent of the Senate.

Mr. Legaré, in an opinion, on the 22d October, 1841, declared that—

> The Constitution authorizes the President to fill vacancies that may happen during the recess of the Senate, even though a vacancy should occur after a session of the Senate has intervened. The executive power of removal from office, as indicated in the argument of Mr. Madison, delivered in the first Congress, drawn from the character of executive power and executive responsibility and the irresistible necessity of the case, has been acquiesced in by the whole country.

Again, in the fourth volume of Opinions of Attorneys General, page 218, will be found the opinion of Mr. Attorney General John Nelson, on the 9th of August, 1843, in Lieutenant Coxe's case, where the applicant was heard by counsel, a proceeding, as I suppose, somewhat rare in the Attorney General's office. In that opinion he declared, referring to the case of Marbury *vs.* Madison, that—

> Even after confirmation by the Senate the President may, in his discretion, withhold a commission from the applicant; and until a commission to signify that the purpose of the President has not been changed, the appointment is not fully consummated.

All of these cases, without stopping to comment upon them, you will see have more or less bearing on the question under consideration. Now indulge me, if you please, while I read extracts from an opinion of Mr. Crittenden, to be found in the fifth volume of the Opinions of the Attorneys General, page 290. It is infinitely a better argument than any which I can present. You will see that he necessarily travels over the same beaten path that we are compelled to travel over in this case; and I think it is a matter of very great

Digitized by Google

consequence that in this case we do show that the path is so well known and so much travelled that there can be no mistake about it.

Upon the question submitted by the President whether he had authority to remove from office the chief justice of the Territory of Minnesota, erected by the act of March 3, 1849, who had been appointed for four years, Mr. Crittenden, in his opinion of the 23d of January, 1851, after referring to Chief Justice Marshall's opinion in the American Insurance Company *vs.* Canter, (1 Peters, 546,) where it was held that these were not constitutional but legislative courts, created in virtue of the general right of sovereignty which exists in the government, said what I will now read. I propose to give you the language of Mr. Crittenden, one of the ablest statesmen who ever sat in these halls, a man without fear and without reproach, a man of a splendid, gigantic intellect, "faithful among the faithless" under all circumstances; one whose opinions, as I respectfully think, are entitled to the highest degree of credit. This opinion was delivered in the meridian of his life, when he was in the full possession of his mental powers, and when there could be no mistake as to the force and effect to which any production of his mind was entitled. He said:

Being civil officers appointed by the President by and with the advice and consent of the Senate, and commissioned by the President, they are not excepted from that executive power which, by the Constitution, is vested in the President of the United States over all civil officers appointed by him, and whose tenures of office are not made by the Constitution itself more stable than during the pleasure of the President of the United States. That the President of the United States has, by the Constitution of the United States, the power of removing civil officers appointed and commissioned by him, by and with the advice and consent of the Senate, where the Constitution has not otherwise provided by fixing the tenures during good behavior, has been long since settled, and has ceased to be a subject of controversy and doubt. In the great debate which arose upon that question in the House of Representatives shortly after the adoption of the Constitution, Mr. Madison is reported to have said, "It is absolutely necessary that the President should have the power of removing from office; it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself if he suffers them to perpetrate, with impunity, high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses. On the constitutionality of the declaration I have no manner of doubt." And the determination of Congress was in accordance with his views, and has since been invariably followed in practice by every President of the United States.

And in the same opinion (page 291 of the same volume) Mr. Crittenden said:

The power of removal is vested by the Constitution in the President of the United States to promote the public welfare; to enable him to take care that the laws be faithfully executed; to make him responsible if he suffers those to remain in office who are manifestly unfit and unworthy of public confidence.

Again, Mr. Cushing, in the 8th volume of Opinions, page 233, in an elaborate opinion in regard to the navy efficiency act of the 28th February, 1855, held:

That the President of the United States possesses constitutional power to dismiss officers of the army or navy co-extensive with his power to dismiss executive or administrative officers in the civil service of the government.

Again, Mr. Speed, in his opinion of April 26, 1865, addressed to Secretary McCulloch, declaring that the act of 1865, vesting the power of appointment of assistant assessors in the respective assessors is unconstitutional, argues that it is the duty of the President to make the appointment; and I ask you, senators, to pay special attention to this opinion, for I suppose that Mr. Speed stands very high in some quarters of the United States. This opinion is not in any of the printed volumes of opinions; I have a certified copy of it which I placed in the possession of Mr. Stanbery, and which can be at any time produced before the Senate; but I vouch for the correctness of the extract which I am about to read:

It is his [the President's] duty to do all he has lawful power to do when the occasion requires an exercise of authority. To do *less* on such an occasion would be *pro tanto* to abdicate his high office. The Constitution is the supreme law—a law superior and paramount to any other. If any law be repugnant to the Constitution it is void."

Digitized by Google

This bears not only on the civil-tenure bill, but it is square up to all the questions the gentlemen on the other side have argued in connection with it. Here is the opinion of the adviser of the President's predecessor, a man whose opinion was on file, a man in whose judgment he had the right to confide, for be it known and always kept in remembrance that the President of the United States is not himself a lawyer; he never studied the legal profession; he has no claims or pretensions to know anything about it; but in the discharge of his official duties he has the right to consult the legal adviser who is placed there to guide and direct him upon questions of law by the Constitution of the country and by the act of 1789. If he finds an opinion on file in his office, or if he finds it recorded in any reported volume of the opinions of the Attorneys General, it is, and is properly, a guide, a precedent which he may safely follow; and it is such an opinion as will protect him against any imputations of unlawful or improper motives. Pardon me for reading this again, so that you may have the whole of it in unbroken connection:

It is his duty to do all he has lawful power to do when the occasion requires an exercise of his authority. To do *less* on such an occasion would be *pro tanto* to abdicate his high office. The Constitution is the supreme law—a law superior and paramount to any other. If any law be repugnant to the Constitution, it is void; in other words it is no law.

And, Mr. Chief Justice, if you see proper in the discharge of your duty to comply with the respectful request which has been presented to you to deliver an opinion upon any of the legal questions which are involved in this case, I most respectfully ask you to consider this opinion of the Attorney General, and to declare that it is sound doctrine "that if any law be repugnant to the Constitution it is void; in other words, it is no law." Now, allow me, Mr. Chief Justice, to call your attention to the closing sentence of this opinion of Mr. Speed, which I think is the very essence of the law:

It is the peculiar province of the judicial department to say what the law is in particular cases. But before such case arises, and in the absence of authoritative exposition of the law by that department, it is equally the duty of the officer holding the executive power of the government to determine for the purposes of his own conduct and action as well the operation of conflicting laws as the unconstitutionality of any one.

There is an opinion from an Attorney General who is not a member of the cabinet, not a "serf" of the President, who gave his opinion before or about the time the present incumbent came into the presidential office. There is his opinion placed upon the records of one of the departments of this government, to stand and to stand forever, so far as his opinion will go, as a guide to the highest executive officer in the government, declaring that if a law is unconstitutional in the view of the President, it is no law at all, and he is not bound to follow it. He declares that the President has the right, in the absence of any judicial exposition, to construe the law for himself. I need not tell the Senate that this is no new doctrine. Senators, within your day and mine there was an executive officer of the United States, who was, as they say the present incumbent is, a man of strong will, a man not possessing any great advantages of education or of mental culture, but still a man of strong intellect and of determination just as strong as his intellect. You all remember Andrew Jackson, a name that was once potent in the United States. No name was ever more powerful in this government of ours, from the time of its foundation down to the present day, than the name of Andrew Jackson. "There were giants in those days" when Andrew Jackson was at the head of the government of the United States. Andrew Jackson exercised the power of removal, and his right to do so was called in question by some of the ablest men who ever sat within the Senate of the United States. It was discussed and learnedly discussed; and yet he persevered in his determination. He maintained the power and authority of the President of the United States to remove from office and to make appointments, and you all recollect the scene that occurred, and which made the history of this body memorable.

Digitized by Google

A resolution was introduced into the Senate—I believe it was occasioned, in part at least, by the removal of Mr. Duane—to the effect that the President of the United States, in his late proceedings, had violated the Constitution of the United States. That resolution passed the Senate; but a gentleman who is now no more, one whose name is well-known in the political history of the United States, Mr. Benton, took up that subject. I have not recurred to the history of the debates with sufficient accuracy to tell how long it was that he continued to agitate the question, but my recollection is that it was for several years; and I remember, as all these senators will remember, the remarkable expression which Mr. Benton used: "Solitary and alone I set this ball in motion." He determined that the resolution censuring the President of the United States should be expunged from the records of the Senate; and he debated it time and again with tremendous energy and power, until at last the resolution was expunged from the journal of the Senate of the United States. So far as there is any recorded judgment within my knowledge, that is the last record. It is a record in favor of the power of removal. There was "the sober second thought" of the Senate. There was a rescission of a resolution that reflected upon the character and upon the action of General Jackson; and, so far as that record goes, it is in favor of the power and authority which I have argued for. There can be no controversy in regard to this.

Now let us see how far we have progressed in this argument. I have shown you the opinions of Mr. Madison and Mr. Sedgwick and others in the debate of 1789. I have shown you the opinions of Kent and Story, two of our ablest American commentators. I have shown you opinions of Attorneys General, eminent in their profession and standing high in the confidence of the country. I have shown you the action of the American Senate in the expunging resolution. I thus present to you what I may call, in the language of Judge Story, an unbroken current of authority in favor of the proposition that not only the civil-tenure bill is unconstitutional, but that the President has the right to remove from office. I mean to say that the principles maintained by them would lead to that result, that he has the power of removal which he claims in his answer. And I maintain, senators—forgive the repetition—that whether he is right or wrong in this, this current of authority for near eighty years is sufficient to throw protection around him; and when I show you, as I have done from the opinion of Mr. Speed, that in the absence of any judicial determination it is the sworn and bounden duty of the President of the United States to judge of a constitutional question for himself, I do not present to the Senate any novel doctrine. It is not for me to say whether the doctrine is right or wrong. My opinions are of no sort of consequence in this Senate. If my arguments are well founded, and if they are well supported, they will have weight and influence with you; if not, they will be rejected. So it is not necessary for me to say what I think upon these questions; but I maintain that this is not a novel doctrine in the United States. I told you yesterday that the present President is a democrat of the straightest sect. I told you that he was really nominated as a democrat in the convention that nominated Mr. Lincoln and himself for President and Vice-President. That was not a democratic convention, I know. It was a convention composed of Union men without any reference to the old lines of demarcation between whigs and democrats. That was a convention which had assembled together for the purpose of sustaining Mr. Lincoln, and whose view and opinion was that by sustaining Mr. Lincoln and the measures of his administration they would sustain the strong arm of the government in putting down the rebellion, which had not then been brought to a conclusion. In his letter accepting the nomination, as I told you yesterday, President Johnson remarked that he was a democrat.

Senators, I will read to you the opinions of Mr. Jefferson and General Jackson, presently; but before I do that let me call your attention to the effect of

Digitized by Google

this political training of the President of the United States. You must always bear that in mind. You must go to his stand-point and look at things as he looked at them and judge of them as he judged of them, for you are now in search of motive; that is what you are trying to determine in this case. You are in search of the question of intention; and when you judge of his conduct in that way, and when you remember that he is a democrat of the Jeffersonian and Jacksonian school, if I can show you, as I will presently show you, that Mr. Jefferson and General Jackson undertook to construe the Constitution of the United States for themselves, and claimed that as executive officers they had the right to do so, I show you that according to the political training and education of the President of the United States it is a doctrine in which he might well believe; and especially when you have Mr. Speed's opinion that I have read confirmatory of that doctrine, it furnishes a sufficient vindication and protection of the President as to the exercise of his judgment.

Let us see what Mr. Jefferson and General Jackson said on this subject. Mr. Jefferson, if I understand him correctly, carried his doctrine much further than the present President of the United States carries it. I will refer to the sixth volume of Mr. Jefferson's works, page 461, and I will read a part of a letter of his there to be found, from which you will see he goes a bar's length beyond the present President of the United States in the views that he entertains. The President has told you that he was anxious to have the question between him and Congress settled by the judicial department. But what were Mr. Jefferson's views? He, as you all very well know, and the world knows, was the author of the Declaration of Independence, and one of the greatest of the revolutionary minds. In the letter to which I have referred, to Mr. Torrance, he said:

The second question, whether the judges are invested with exclusive authority to decide on the constitutionality of a law, has been heretofore a subject of consideration with me in the exercise of official duties. Certainly there is not a word in the Constitution which has given that power to them more than to the executive or legislative branches. Questions of property, of character, and of crime, being ascribed to the judges through a definite course of legal proceedings, laws involving such questions belong, of course, to them; and as they decide on them ultimately and without appeal, they, of course, decide *for themselves*. The constitutional validity of the law or laws again proscribing executive action, and to be administered by that branch ultimately and without appeal, the executive must decide for *themselves* also whether under the Constitution they are valid or not. So also as to laws governing the proceedings of the legislature, that body must judge *for itself* the constitutionality of the law, and equally without appeal or control from its co-ordinate branches. And, in general, that branch which is to act ultimately and without appeal on any law is the rightful expositor of the validity of the law, uncontrolled by the opinions of the other co-ordinate authorities.

So that, if I correctly apprehend Mr. Jefferson's meaning in this letter, he goes a bar's length beyond the right asserted by Mr. Johnson in his answer in this case:

It may be said that contradictory decisions may arise in such case, and produce inconvenience. This is possible, and is a necessary failing in all human proceedings.

He goes on to show, in this letter to Mr. Torrance, that such contradictory decisions had arisen and no special harm had resulted; but I do not deem it material to occupy your time with reading at length. In the seventh volume of Mr. Jefferson's Works, page 135, he says, in a letter to Judge Roane:

My construction of the Constitution is very different from that you quote.

I do not read the rest, because there is so much reading necessary to be done in the argument of the case that I am really fearful of wearying your patience, and I take it that it is not necessary for me to do so, because the mere mention of this letter will call it up to the recollection of senators, and you will remember the connection. I only read so much of it as bears upon the point which I am endeavoring to illustrate:

My construction of the Constitution is very different from that you quote. It is that each

Digitized by Google

department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action; and especially where it is to act ultimately and without appeal. I will explain myself by examples which, having occurred while I was in office, are better known to me, and the principles which governed them.

I deem it unnecessary to read further from this letter. The point is, that in this letter he asserts that "each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action; and especially where it is to act ultimately and without appeal." If that doctrine be correct the President of the United States had the right to decide this question for himself, independent of any intention or design to have a case made and prepared for the adjudication of the judicial tribunals of the country. But, even if that be not correct, it certainly goes far to explain, if not to justify, the action of the President of the United States in the removal of Mr. Stanton.

Although it is not precisely in connection with this point, yet, as it may have a bearing upon the question, I will quote a sentence from General Jackson's Maysville road bill veto. Of course that can be found anywhere and everywhere in your records; but for the sake of convenience I quote it from the Statesman's Manual, volume two, page 726:

When an honest observance of constitutional compacts cannot be obtained from communities like ours it need not be anticipated elsewhere; and the cause in which there has been so much martyrdom, and from which so much was expected by the friends of liberty, may be abandoned, and the degrading truth, that man is unfit for self-government, admitted. And this will be the case if *expediency* be made a rule of construction in interpreting the Constitution. Power in no government could desire a better shield for the insidious advances which it is ever ready to make upon the checks that are designed to restrain its action.

On page 772, in General Jackson's veto of the bank bill, he said:

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this government.

I want you, now, to notice these assertions, for you will see that such great men as Jefferson and Jackson went beyond the present President of the United States in their assertions, for they denied the right of the Supreme Court even to adjudge a question:

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.

I remember very well that there was a great deal of criticism at that day about this principle asserted by General Jackson in his veto of the bank bill; but it is enough for me to show that he asserted the power.

It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges; and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

That was prerogative! We have heard a great deal of talk here about prerogative. That was prerogative when General Jackson asserted that he had the right to construe the Constitution of the United States for himself, and independent of the judicial tribunals of the country. If General Jackson and Mr. Jefferson asserted this extraordinary power while they were filling the executive office, how much more may Andrew Johnson, the present President of the United States, say: "Here is a question about which there is a difference of opinion between the Congress of the United States and myself; here is a question that is distracting and dividing the country; I desire to have this question settled; I do not wish to settle it by my own strong hand; I desire to submit it to the judicial tribunals of the country; and in order to do that I

Digitized by Google

will exercise a power which has been exercised from the foundation of the government; I will remove Mr. Stanton; I will place this question in a condition in which it can be settled by the judicial tribunals of the United States; I will endeavor to do this; I will invoke the action of the highest judicial tribunal in the country." Of course this idea was involved: "If the Supreme Court of the United States decide this question in favor of the view which Congress has presented I will acquiesce in and submit to the decision; if the Supreme Court decide the question the other way I will persevere in the determination to appoint some one else in the place of an officer in my cabinet who is obnoxious to me." Now, I maintain, senators, that there was nothing wrong in this; nothing illegal in it.

Oh, but it is argued on the other side that after the President of the United States has vetoed a bill, and after it has been again passed by two-thirds of both houses of Congress, it is then placed in such a situation that he has no right to put any construction upon it different from that which Congress has placed upon it. I cannot see the logic of the difference between the two cases. A law, when passed by Congress and approved by the President of the United States and placed upon the statute-book, is nothing more than a law. If the President of the United States exercises his veto power and attempts to prevent the passage of a law, or, in other words, refuses that assent which the Constitution empowers him to give or to withhold, and the Congress of the United States passes it over the veto and it goes upon the statute-book, is it anything more than a law? Has it any greater or more binding force in the one case than it has in the other? And if the President of the United States has any power of judgment, and especially of judgment in cases where duties are confided to him by the Constitution and where it is his business to act, may he not exert in the one case just as much as in the other? I cannot for the life of me see the force of the distinction which the learned and honorable managers are attempting to take in this case.

Senators, there are questions peculiarly belonging to the executive department which the President of the United States of necessity must have the right of determining for himself. Specious and ingenious as the argument of the honorable manager yesterday was, that there may be an implication in favor of Congress as to the exercise of its powers enumerated in the Constitution, and that there can be no implication in favor of the President as to the duties that are imposed upon him by the same instrument, it still has no foundation in sound reason or in any authority known to the law. The very term "executive power" is, like most of the other terms employed in the Constitution, a technical phrase. I have shown you how Mr. Madison understood it in the debate of 1789. I have shown you what a wide latitude of interpretation he took in giving a meaning to the words "executive power," and that he held that in virtue of those very words the President was responsible for the action of the cabinet that he had called around him.

If you can get from the Constitution an implication in any case; if you can derive from the words "executive power," or from the words "he shall take care that the laws be faithfully executed," or from his oath, or from any other words in the Constitution relating to his functions, any power by implication in any case, the doctrine of implication arises as to all other powers that may be conferred upon him; and I can see no reason why you may not imply anything that is necessary to be done as much in favor of the President as you may imply it in favor of Congress. When you take the Constitution of the United States and look to the enumerated powers, there is not one of them that tells how any power is to be executed. Congress may create a navy; Congress may declare war; Congress may levy taxes. It does not say how you are to create a navy; it does not say whether you are to do that particular act by taxation or not; it

Digitized by Google

does not prescribe whether your vessels are to be iron-clad vessels or sail vessels; it does not prescribe how much tonnage they shall have.

All these and a thousand other things are left to the discretion of Congress. You derive the power which you have exercised time and again, from the foundation of the government, in regard to the army and the navy and every other branch of the public service, as a necessary incident under the general provision of the Constitution to do anything that may be necessary and proper to carry any of the granted powers into effect. Now, if this doctrine of implication which is absolutely necessary and essential to the legitimate and proper exercise of the powers conferred on Congress by the Constitution has been acquiesced in and practiced on from the foundation of the government by Congress, why may it not be acquiesced in as to the President of the United States? There is no force, as I maintain, in the distinction which the honorable manager insists upon.

Mr. JOHNSON. Mr. Chief Justice, I move that the court take a recess of fifteen minutes.

The motion was agreed to; and at the expiration of the recess the Chief Justice resumed the chair and called the Senate to order.

Mr. NELSON. Mr. Chief Justice and Senators, I have been reminded of one thing which I should have stated to you before; and before I proceed further I desire to call your attention to it. I have not had opportunity to consult the works upon the subject, but I presume the fact is well known to the Senate that Mr. Clay and Mr. Webster, in the progress of the debate upon General Jackson's conduct in reference to the removal of Mr. Duane and the removal of the deposits, conceded the power of the President to remove the Secretary, but their opposition to his course was founded mainly upon objections growing out of the law upon the subject of the Treasury Department. This, if I am correctly informed—and I believe I am—is an additional and very strong opinion in favor of the proposition for which I have contended before you.

Upon the question on which I was addressing you, I have not only the opinion of Mr. Jefferson and General Jackson, but I have the high authority of Mr. Madison himself. In the fourth volume of Madison's Works, page 349, is a letter which was written by him in 1834. Without reading the whole letter, I will only read so much of it as I think is pertinent to the question before you.

Mr. JOHNSON. Who is the letter to? To Mr. Coles?

Mr. NELSON. It is not stated, sir; it is blank. It is dated 1834, and will be found on page 349 of the fourth volume of his works. The letter is not very long, and is as follows:

DEAR SIR: Having alluded to the Supreme Court of the United States as a constitutional resort in deciding questions of jurisdiction between the United States and the individual States, a few remarks may be proper, showing the sense and degree in which that character is more particularly ascribed to that department of the government.

As the legislative, executive, and judicial departments of the United States are co-ordinate, and each equally bound to support the Constitution, it follows that each must, in the exercise of its functions, be guided by the text of the Constitution according to its own interpretation of it, and, consequently, that in the event of irreconcilable interpretations, the prevalence of the one or the other department must depend on the nature of the case, as receiving its final decision from the one or the other, and passing from that decision into effect without involving the functions of any other.

The argument upon the other side is that the President of the United States, under the Constitution, is a mere man in buckram; that he has no power or authority to decide anything; that he can do nothing on the face of the earth unless it is nominated in the bond; that he must be the passive instrument of Congress; and that he must be subjected to the government and control of the legislative department of the government. The argument which we make is, that under the Constitution there are living, moving, acting powers and duties vested in and imposed upon the President of the United States, and that he

Digitized by Google

must, of necessity, have the right, in cases appropriately belonging to his department of the government, to exercise something like judicial discretion; that he must act upon his own authority and upon his own construction of the Constitution; and when he thus acts in reference to the removal of an officer or anything else, I maintain that it is different from the action of a private individual. A private individual, if he violates the laws of the land, is amenable for their violation under the principle that "ignorance of the law excuseth no man;" but the President of the United States, having the executive power vested in him by the Constitution, has the right to exercise his best judgment in the situation in which he is placed, and if he exercises that judgment honestly and faithfully, not from corrupt motives, then his action cannot be reviewed by Congress or by any other tribunal than the tribunal of the people in the presidential election, should he be a candidate before them again, and he is protected by the powers imposed by the Constitution. Mr. Madison proceeds:

It is certainly due from the functionaries of the several departments to pay much respect to the opinions of each other; and, as far as official independence and obligation will permit, to consult the means of adjusting differences and avoiding practical embarrassments growing out of them, as must be done in like cases between the different co-ordinate branches of the legislative department.

But notwithstanding this abstract view of the co-ordinate and independent right of the three departments to expound the Constitution——

Mark his phraseology there. One of the makers of the Constitution, hoary with age, venerable at the time when this letter was written, having no motive except to leave to posterity the mature judgment of a patriot in regard to the true and proper construction of that sacred instrument which he had an agency in making, Mr. Madison says:

But notwithstanding this abstract view of the co-ordinate and independent right of the three departments to expound the Constitution, the judicial department most familiarizes itself to the public attention as the expositor by the order of its functions in relation to the other departments, and attracts most the public confidence by the composition of the tribunal.

It is the judicial department in which questions of constitutionality, as well as of legality, generally find their ultimate discussion and operative decision; and the public deference to and confidence in the judgment of the body are peculiarly inspired by the qualities implied in its members, by the gravity and deliberation of their proceedings, and by the advantage their plurality gives them over the unity of the executive department, and their fewness over the multitudinous composition of the legislative department.

Without losing sight, therefore, of the co-ordinate relations of the three departments to each other, it may always be expected that the judicial bench, when happily filled, will, for the reasons suggested, most engage the respect and reliance of the public as the surest expositor of the Constitution, as well in questions within its cognizance concerning the boundaries between the several departments of the government, as in those between the Union and its members.

And it was, as I said before, to that department that the President of the United States desired that an appeal should be made. But you will observe here that the idea is distinctly presented by this venerable and patriotic man that the co-ordinate and independent departments of the government have the right, each for itself and each within its appropriate sphere and in relation to its own appropriate duties, to construe the Constitution. If this view be correct the President of the United States had the right to construe the Constitution for himself, notwithstanding the passage of the civil-tenure bill, and he had the right to act under it in the manner in which he did, and you cannot make a crime, you cannot make an offence out of such an action. You cannot justify it in the view of the American people; you cannot justify it to the civilized world; senators, I maintain that you cannot justify it to your own consciences to place such a construction as that upon the act of the President, and to deny him the powers which he has attempted to exercise in this case.

Now, let me call your attention to the famous protest of General Jackson, and you will see that the same doctrine is carried out there:

By the Constitution the "executive power is vested in the President of the United States.' Among the duties imposed upon him, and which he is sworn to perform, is that of "taking

care that the laws be faithfully executed." Being thus made responsible for the entire action of the executive department, it was but reasonable that the power of appointing, overseeing, and controlling those who execute the laws—a power in its nature executive—should remain in his hands. It is, therefore, not only his right, but the Constitution makes it his duty, to "nominate, and by and with the advice and consent of the Senate, appoint," all "officers of the United States whose appointments are not in the Constitution otherwise provided for," with the proviso that the appointment of inferior officers may be vested in the President alone, in the courts of justice, or in the heads of departments.

The executive power vested in the Senate is neither that of "nominating" nor "appointing."

You will see that General Jackson, with characteristic energy and courage, stood up faithfully in vindication of his executive power while he was President of the United States:

The executive power vested in the Senate is neither that of "nominating" nor "appointing." It is merely a check upon the executive power of appointment. If individuals are proposed for appointment by the President, by them deemed incompetent or unworthy, they may withhold their consent and the appointment cannot be made. They check the action of the executive, but cannot in relation to these very subjects act themselves nor direct him. Selections are still made by the President; and the negative given to the Senate, without diminishing his responsibility, furnishes an additional guarantee to the country that the subordinate executive, as well as the judicial offices, shall be filled with worthy and competent men.

The whole executive power being vested in the President, who is responsible for its exercise, it is a necessary consequence that he should have a right to employ agents of his own choice to aid him in the performance of his duties, and to discharge them when he is no longer willing to be responsible for their acts.

The very idea that one of the senators I now address, Senator SHERMAN, must have had in his mind at the time when he made those remarks which were quoted by Judge Curtis in the opening upon our side:

In strict accordance with this principle the power of removal, which, like that of appointment, is an original executive power, is left unchecked by the Constitution in relation to all executive officers for whose conduct the President is responsible, while it is taken from him in relation to judicial officers for whose acts he is not responsible. In the government from which many of the fundamental principles of our system are derived the head of the executive department originally had power to appoint and remove at will all officers, executive and judicial. It was to take the judges out of this general power of removal, and thus make them independent of the executive, that the tenure of their offices was changed to good behavior. Nor is it conceivable why they are placed in our Constitution upon a tenure different from that of all other officers appointed by the executive, unless it be for the same purpose.

Now, senators, at the hazard of some repetition, allow me at this point to sum up as far as I have gone. I have shown you that in the debate of 1789 some of the ablest men this country ever produced, and some of the very men who had an agency in framing the Constitution itself, conceded the power of removal, as claimed by the President. I have shown you that for nearly eighty years, with the single exception of the struggle which took place in General Jackson's time, that power has been acquiesced in. I have shown you that two of the most eminent writers on American jurisprudence, Kent and Story, have treated the question as settled. I have shown you, from the opinions of some of the ablest Attorneys General who have ever been in office in this country, that the power of removal existed in the manner in which it was exercised by the President. I have shown you that, from this opinion and practice during the long period of time to which I have adverted, it was conceded that the power of removal belonged to the President in virtue of the Constitution, and that the Senate had no constitutional right or power to interfere with him. Having shown you all this, I have now a few words to say in regard to the President's act in removing Mr. Stanton and in further answer to the first article against him.

As you have observed, the first proposition which I have endeavored to demonstrate is, that the civil-tenure bill is unconstitutional and void; for if the doctrines be correct which I have endeavored to maintain before you, and if this long chain of authority is entitled to the slightest degree of respect, it follows inevitably that Congress had no power to pass the law; and it follows, further-

more, that the President had the right to exercise a judgment in regard to retaining or removing one of the councillors whom the Constitution had placed around him for the purpose of aiding him in the administration of public affairs.

But the other view in which I wish to argue the case—and it has already been indicated in various statements from time to time made by me in the progress of my remarks—is this: suppose that the proposition I have endeavored to maintain before you is erroneous; suppose that Congress are right, and that the President is wrong; suppose that Congress had the power to pass the civil-tenure bill; suppose that he had no right to act contrary to that; then the question comes up whether or not he is guilty upon any of these articles of impeachment. The first eight articles charge in different forms an intent to violate the Constitution of the United States, or to violate the civil-tenure bill, or to violate the conspiracy act of 1861. Every one of those articles contains a charge of an unlawful intention; they do not charge an unlawful act simply, with the exception of the 5th article, which says nothing about the intent. Now, recurring to what I have already said on this subject, I desire to sustain what I have said by a reference to some of the decisions or some of the opinions in the law books, and I ask the question how can any unlawful intent be predicated of his act? According to Foster and Hale and other writers upon criminal law, and I quote this from 1 Bouvier's Dictionary, page 647, who cites Foster and Hale and others for the definition:

"Every crime must have, necessarily, two constituent parts, namely, an act forbidden by law and an intention."

And that is as applicable, I take it, to a high misdemeanor as it is to a high crime.

The act is innocent or guilty, just as there was or was not an intention to commit a crime; for example, a man embarks on board a ship at New York for the purpose of going to New Orleans; if he went with an intention to perform a lawful act he is perfectly innocent; but if his intention was to levy war against the United States, he is guilty of an overt act of treason.

Mr. Bishop, in his work on criminal law, section 252, says:

Intent is not always inferable from the act done.

I maintain that, there being no unlawful or improper intention, there can be no crime or misdemeanor, and although I did not read this yesterday, I substantially cited it; but having it here, I ask your indulgence to repeat it again in the language of the book itself. I refer to Wharton's Criminal Law, page 733, and Roscoe's Criminal Evidence, page 804, to sustain this proposition:

An indictment against an officer of justice for misbehavior in office must charge that the act was done with corrupt, partial, malicious, or improper motives, and above all, with a knowledge that it was wrong.

In Wharton, page 269, and 2 Russell, 732, this principle is stated:

As to acts of an official nature, everything is presumed to be rightfully done until the contrary appears.

Again, Mr. Bishop, in his Criminal Law, section 80, says:

A case of overwhelming necessity (as to intent) or honest mistake of fact will be excepted out of a general statute.

Now, senators, if these are the rules that prevail in courts of law—and they are rules founded in wisdom, in common sense, in justice—if these rules obtain in criminal trials every day in courts of law, what is there to prevent them from being enforced in this court, and what is there to prevent them from shielding this respondent from the imputation which is made upon him? How can it be said that he had any wrongful or unlawful intent when the Constitution gave him the power to judge for himself in reference to the particular act? How can it be said that he had any wrongful or unlawful intent when the practice of the government for the long period of time to which I have adverted was sufficient

to justify him in exercising the power which he attempted to exercise? How can it be said that there was any wrongful or unlawful intent when he had all these opinions of the Attorneys General to guide and lead and direct him? How can it be said that there was any unlawful intent when he had the very opinions of the senators and representatives at the time when the law was passed as a guide to lead and direct him in the performance of his duty? It does seem to me that it beggars all belief to say that the President intended anything wrong. It outrages our ideas of common justice and of common sense to say that there was any purpose or intent upon his part either to violate the Constitution or to violate the civil-tenure bill. If Mr. Speed is correct, and if the other writers are correct, and the President believed that the law was unconstitutional, then, until the question at least was adjudicated by the highest court in the United States, the President had the right to exercise his judgment, and you cannot hold that he was guilty of any criminal intention.

Was ever such a case presented? How bald, how naked do these charges appear when you look at the proof! I will not take up time, senators, to turn to the evidence of witnesses which you all have fresh in your recollection. Was there ever such a scene in the history of the world among men claiming to have intelligence, among persons in the exercise of ordinary reason and judgment, as the scene that occurred in reference to Mr. Stanton's removal and the attempt to bring the question before the courts of justice. There is old General Thomas, whom they stigmatize a good deal on the other side; but I take him to be a plain, simple-hearted, honest old gentleman, who has been 40 years in the military service of the country. If there were any suspicions about him, such as the gentleman [Mr. Manager Boutwell] alluded to yesterday, as to whether he was in favor of the rebellion or against it, it is a very extraordinary thing that Mr. Stanton should send him down to the southern States, and that he should organize some seventy or eighty thousand negroes there to fight the battles of the Union. He is a plain, simple-hearted, honest old man, whose very countenance is a recommendation to him before any body under the heavens hears him speak. Perhaps his vanity was a little tickled by the idea of being appointed Secretary of War. No doubt the old man felt very comfortable at that elevation for a little while. But who that heard his testimony in this court can doubt for a moment his intention to speak the truth in regard to everything he said? He goes to the War Department, and you have that wonderful scene at the time when he attempts to take possession of the office of Secretary of War. This he was going to do with force and violence! Was there ever such a thing since the world began, such an act of force as you had there between Mr. Thomas and Mr. Stanton when this proceeding was going on? They met together like twin brothers. They almost embraced each other. I believe he said Mr. Stanton did hug him, or something like that. [Laughter.] He came very near it, if he did not actually do it; and in the fullness of his heart Mr. Stanton became exceedingly kind and liberal upon the occasion, and he called for liquor, and had it brought out, and there was that great dram, containing about one spoonful, fairly, honestly, equally divided between these two aspiring Secretaries, and done in a spirit of fraternity and of love such as I suppose never was witnessed in a forcible contest on the face of the earth before. [Laughter.]

An attempt was made to have this question settled. Stanton puts his arm around him and says, "This is neutral ground, Thomas, between you and me; there is no war here when we have this liquor on hand;" and not only divided that spoonful, but he felt so good after he took that that he sent out and got a bottle full more. [Laughter.] I suspect, Senators—I do not know how the fact is—but I suspect that old friend Thomas not only felt a little elevated by the idea of being Secretary of War *ad interim*, after having served his country in a somewhat inferior capacity for a good while, but I imagine the old man took so much of that good liquor on that occasion that he felt his spirits very much ele-

vated, and was disposed to talk to Mr. Karsener and all these other men in the manner in which he did talk.

And yet they tell you this was force! Oh, yes, force; attempting forcibly to eject Mr. Stanton from the office of Secretary of War—by drinking a spoonful of liquor and helping to divide a bottle with him! Was there ever such an idea of force before? This is the "lame and impotent conclusion" of the proceeding which we have upon the other side.

Well, they conclude that they will depart from that neutral ground. After they got out of the building Mr. Stanton goes along and he wakes up Mr. Meigs in the dark hours of the night—he or some of his friends. It is *idem sonans;* it is the same thing, I reckon. Whatever he did by others he did by himself. His friends go and arouse Mr. Meigs in the dark hours of the night, as if some felony were about to be committed. They go there as if they were attempting to raise the hue and cry. They wake him from the slumbers of the night and require him to go to his office to make out a warrant against old man Thomas for trying to violate the civil-tenure bill. He rises and goes to his office with hot haste, something like the haste in which this impeachment proceeding was gotten up. He goes to his office. He issues his warrant with all proper gravity and decorum, and it is placed in the hands of an officer, and poor old Thomas, with about a pint or a quart of liquor in him, [laughter,] is arrested and taken before a judge to be tried for this great offence of violating the civil-tenure bill! He is placed in the custody of an officer as if he had committed some horrible outrage, some terrible offence. The officer follows him over to the President's. He sticks to him like a leech, closer, a good deal, than a brother. [Laughter.] He follows him over there, and will not allow poor old Thomas to get out of his sight at all. "Oh, you have committed a terrible offence; you have violated the civil-tenure bill; you are liable to fine and liable to imprisonment, and I cannot permit you, sir, to escape out of my clutches." But at last the old man gets a lawyer and comes along before the judge. The lawyers get to discussing the question before the judge, and strange to say this terrible offence which it took a midnight warrant to reach, this terrible offence which it required a marshal or some other officer with his tipstaff to take care should not be committed with impunity, and to hold on to the person of Thomas so that he could not escape—when these lawyers came to argue it before the judge, and they began to find out there was some idea of taking the thing up to the Supreme Court, the tune was changed. "A change came o'er the spirit of their dream," and this offence, which was so terrible a few hours before, sinks into insignificance, and the old man Thomas is discharged, as the judge discharged the turkey at the table that had been there for a week, upon his own recognizance. [Laughter.] No case is to be permitted to be made out for the settlement and adjudication of the Supreme Court of the United States.

Mr. Secretary Stanton's great warrant reminds me of an anecdote, senators. I am a very poor hand at telling one, but I believe I will try it. I do not know whether I shall succeed in telling it or not. It is one I used to hear a gentleman in our State of Tennessee tell about two Irishmen. They came over to this country and were very ignorant of our habits and manners and customs, and particularly in reference to the "varmints" that belonged to the United States. They were walking along one day, and they saw a little ground squirrel run up on a stump and then go down into the hollow of the stump. One of the Irishmen concluded he would catch him and see what kind of a "baste" it was. So he put his hand down in the hollow, and the other one said to him, "Have you got him, Pat?" "No," he replied, "by the powers, he has got me!" [Laughter.] And that was just exactly the way, senators, with Mr. Stanton and this great warrant. Instead of getting Mr. Thomas, they found he was likely to get them, and therefore he was discharged upon his own recognizance, and we hear nothing more of his great offence. Who ever heard of such a pro-

ceeding as this intended to be converted into a grave and terrible and awful charge against the President of the United States, "or any other man?" [Laughter,]

Before I pass, senators, from this view of the case, allow me to read an authority here, without comment, in support of a proposition which I assumed before you awhile ago as to the force and effect of the long-continued usage and practice of the government and the universal interpretation of the Constitution. I should have read it before. Chancellor Kent, in the first volume of his Commentaries, page 528, says:

A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture with confidence to buy and trust and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court except for very cogent reasons and upon a clear manifestation of error, and if the practice were otherwise it would be leaving us in a state of perplexing uncertainty as to the law.

And the very same thing can be said about the construction of the Constitution and the acts of the Executive for a long time.

The language of Sir William Jones is exceedingly forcible on this point. "No man," says he, "who is not a lawyer would ever know how to act, and no man who is a lawyer would, in many instances, know what to advise unless courts were bound by authority as firmly as the pagan deities were supposed to be bound by the decrees of fate."

I shall not repeat, senators, what I esteem to be the unanswerable argument of Judge Curtis, that the removal of Mr. Stanton is not a case embraced, or intended to be embraced, in the tenure-of-civil-office bill according to the terms of the bill itself. It is enough for me to refer you to that argument without repeating it.

And so, having on this branch of the case considered the three propositions with which I set out, having endeavored to demonstrate upon the first article, first, that the civil-tenure act is unconstitutional; second, that the action of the President was not a violation of the terms of the civil-tenure bill itself, because, from what occurred at the time that bill was passed it is manifest that it was not intended to embrace the Secretaries, as Judge Curtis showed in his extracts from the remarks that were made at the time when the bill was passed; and having, shown, third, that if both these propositions be incorrect, still there was no intent, so as to maintain the accusation that is made upon the first article. I pass to the second article, and will endeavor to make my argument as brief as possible upon it.

The second article charges, in substance, that the President was guilty of a high misdemeanor in office by delivering the letter of authority to General Thomas while the Senate was in session, without its advice and consent, when there was no vacancy, and contrary to the tenure-of-civil-office act. In our answer we show that a vacancy existed when the letter of authority was delivered; that the appointment *ad interim* was justified by long usage, though the Senate was in session; that the tenure-of-civil-office act was not violated, even if it is a constitutional law, because the notification to the Senate of the removal and the appointment of Mr. Ewing, shows that there was no criminal intent, no design to prevent the Senate from the exercise of its concurrent power in the appointment of a successor to the man who was attempted to be removed by the President.

Digitized by Google

The third article sets out the letter to Thomas, charges that he was appointed during the session when there was no vacancy, and that this was a high misdemeanor in office. In our answer we rely on the answer to the first article; deny that Thomas was "appointed" in the sense of the term used there, and insist that he was only temporarily designated; that there was no intent to violate the Constitution, or make a permanent appointment; and we deny that there was no vacancy. Mr. Story says, in the third volume of his Commentaries, section 1553, that the Senate are said to have protested against the creation and appointment of ministers to Ghent, made during recess; that on the 20th of April, 1822, they held that the President could not create the office of minister and make appointments during the recess, and that——

By vacancies they understood to be meant vacancies occurring from death, resignation, promotion, and *removal*. The word "happen" had relation to some casualty not provided for by law.

If the Senate are in session when an office is created and no nomination is made, the President cannot fill the vacancy (for there is none) during the recess; and upon that question there is, as already shown, some difference of opinion.

The fourth article charges the President with conspiring with Thomas and other persons unknown, with an intent, by intimidation and threats, unlawfully to hinder and prevent Stanton from holding the office, contrary to the act of July 31, 1861, and the Constitution, and charges that in this he was guilty of a "high crime in office." It is not nccessary for me to do more than to refer to the answers in connection with these charges, and make an occasional passing remark upon some of them. The answer contains a general and specific denial; protests that Mr. Stanton was not Secretary; that the act was done to try Mr. Stanton's right; that there was no intimidation or threats, either to prevent Stanton or to induce Thomas, by such means, to obtain the office; that Mr. Thomas proceeded in a peaceful manner; that Stanton still retains undisturbed pcssession; and that the fourth article charges no agreement with Thomas to use threats, and does not state the threats.

Upon this article I have to say: 1. "Conspiracy at common law is an agreement between two or more persons to do an unlawful act, or an act which may become in the combination injurious to others." (1 Bouvier, 281.) "The indictment must show that it was intended to effect an unlawful purpose, or a lawful purpose by unlawful means." (Wharton, 669; Roscoe, 406.) In 3 Burrowe page 1321, it was held that conspiracies may endanger public health, violate public morals, insult public justice, destroy the public peace, or affect public trade or business. It is not necessary that any act should be done or that any one should be defrauded or injured. (1 Bouvier, 281, 282.)

2. The act entitled "An act to define and punish certain conspiracies," approved July 31, 1861, was passed soon after the rebellion commenced. It provides—I am not reading the act; for the sentences of these acts are very long, as are the sentences of most of the acts of Congress that I have read; I only read in connection the phraseology that pertains, as I think, to the particular matter charged—it provides that—

If two or more persons, within any State or Territory of the United States, shall conspire together * * * * by force, to prevent, hinder, or delay the execution of any law of the United States, * * * * * each and every person so offending shall be guilty of a high crime, &c.

On this statute and the fourth article—for I wish to run over them as rapidly as I can—I remark:

1. That it is doubtful whether the word "Territory," as was argued by Judge Curtis, embraces the District of Columbia, acquired after the Constitution, according to Scott *vs.* Sandford, 19 Howard, 615; 2 Story on the Constitution, 196; the United States *vs.* Gratiot, 14 Peters, 537.

2. The Constitution, article one, section eight, clause seventeen, confers the

power to acquire a district not exceeding ten miles square, and does not use the word "Territory," so far as I know, in reference to the District of Columbia, or the district that was to be acquired under that provision of the Constitution.

3. The article does not charge that the act was done "by force," but uses the words "intimidation and threats," without setting out the threats. Although we do not insist here upon the technicality that is required in a declaration or an indictment, yet upon any principle of correct pleading there ought to be enough alleged at least to show what is the offence that the party is charged with, and to bring the offence within the terms of the statute, which, as I say, is not done.

4. It charges that the object was to prevent Stanton from holding the office of Secretary of War, but does not allege how this was done to prevent, hinder, or delay the execution of any law of the United States. It does not set out or refer to the tenure-of-civil-office act.

5. I maintain, without dwelling upon the argument, that there is no proof of conspiracy so as to let in Thomas's declarations, according to the principle stated in Roscoe, 414, 417.

6. There is no proof of intimidation and threats to Stanton.

7. There is no pretence of a high crime in office, as charged in this fourth article.

8. Sergeant Talfourd says a conspiracy is more difficult to be ascertained precisely than any other offence for which an indictment lies—

An indictment against an officer of justice—

And this is a mere repetition, with slightly different phraseology, of a principle I relied on a while ago—

An indictment against an officer of justice for misbehavior in office must charge that the act was done with corrupt, partial, malicious, or improper motives, and, above all, with a knowledge that it was wrong. (Wharton, 733; Roscoe, 804.)

The fifth article charges an unlawful conspiracy with Thomas and others unknown, to hinder and prevent the execution of the tenure-of-civil-office act, and attempting to prevent Stanton from holding the office of Secretary of War. In our answer we deny the charge in its own terms; refer to the answer to the fourth article; deny that Stanton was Secretary; and except to the sufficiency of the fifth article as not showing by what means or what agreement the alleged conspiracy was formed or carried out.

In regard to the fifth article I maintain:

1. As to indictments for conspiracy, one person cannot be convicted. It must be by two, unless charged "with persons unknown;" and for that I refer to Wharton, 693, though that proposition is doubted by Roscoe in his Criminal Evidence, 418. He says that the record of acquittal of one is evidence for another.

2. The tenure-of-civil-office act of March 2, 1867, contains no provision as to "conspiracy."

3. The fifth section makes it a high misdemeanor to accept or hold any employment contrary to its provisions, &c. And the sixth section makes every removal, appointment, or employment contrary to the provisions of the act a high misdemeanor.

4. No force is charged in this article under the act of 1861.

5. We say that no conspiracy is proved. There is no agreement between the President and General Thomas to do any unlawful act whatever. The President, in virtue of his power as President, appoints Mr. Thomas, or attempts to appoint him, to the office of Secretary of War *ad interim*. He does not direct that any force shall be used. He does not direct that any unlawful act shall be done. All that he does is simply to make the appointment, and he does it with a view, as you may infer from all the testimony in the case, of having the question judicially settled.

Digitized by Google

Something was said by one of the managers about General Sherman's testimony in this connection. General Sherman, in his testimony, spoke of the thought of force having crossed his own mind when he was reflecting about what it might be necessary for him to do; but when he was examined the second time, he distinctly and explicitly acquitted the President of the United States of ever having intimated to him any design or purpose whatever to employ force in the ejection of Mr. Stanton from the office of Secretary of War.

6. We say on this fifth article that if the tenure-of-office act is unconstitutional no misdemeanor can arise out of it.

7. A mere conspiracy to prevent the execution of the act of 1861 is not indictable. It must be a forcible conspiracy, or a conspiracy to act by force.

The sixth article, which I shall consider briefly, charges that the President did unlawfully conspire with Lorenzo Thomas by force to seize, take, and possess the property of the United States in the Department of War, then in the custody of Stanton, contrary to the act of July 31, 1861, and with intent then and there to violate "an act regulating the tenure of certain civil offices," and that he was thereby guilty of a "high crime in office." The denial to this article is brief and general. It denies that Stanton was Secretary; denies the conspiracy and unlawful intent; and refers to the former answers. The first section of the conspiracy act of 1861 declares that—

> If two or more persons within any State or Territory of the United States, shall conspire together * * * * by force to seize, take, or possess any property of the United States against the will or contrary to the authority of the United States, * * * * each and every person so offending shall be guilty of a high crime, &c.

On this act and article I argue:

1. That the President is not "a person" within the meaning of the act, and that official delinquency is always appropriately designated.

2. He is commander-in-chief of the army and navy, may recommend laws, command the army and navy and the militia when called into active service, require opinions in writing from his cabinet officers, and he is required to take care that the laws be faithfully executed.

3. From these powers it results that the Department of War and the Secretary are under his control, and that he cannot be charged with seizing a thing which he had the right to take or to control by means of his authority over the Secretary of War.

4. The article does not charge that he attempted to seize, take, and possess the property "against the will or contrary to the authority of the United States," so as to bring the crime within the definition of the act of 1861.

The seventh article charges the President with conspiring with Thomas unlawfully to seize, take, and possess the property of the United States, in the Department of War in the custody of Stanton, Secretary for the department, with intent to violate the act regulating the tenure of certain civil offices, as a "high misdemeanor in office." The answer denies and negatives the terms of the charge, refers to former answers, and alleges that the allegations are insufficient.

I scarcely think any argument is necessary upon this seventh article, though I will say briefly that I do not see any violation of the President's oath of office in this or any other case; that, for the reasons already indicated, in view of the authorities which have already been read, there was no conspiracy; that the intent to seize, take, and possess the property in the War Department is not an offence within the tenure-of-civil-office act; that Thomas's declarations are no evidence of the conspiracy, as shown in Roscoe, 414, 417. Mr. Starkie says that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the objects of the conspiracy, are not evidence even to prove the existence of a conspiracy.

In reference to the eighth article, which charges that the President committed

Digitized by Google

and was guilty of a high misdemeanor in issuing and delivering to Thomas a letter of authority "with intent unlawfully to control the disbursements of the moneys appropriated for the military service and for the Department of War," contrary to the act regulating the tenure of certain civil offices, without the consent of the Senate, while the Senate was in session, and there being no vacancy, the answer admits the issuance of the letter of authority, but denies any unlawful intent; insists that there was a vacancy, and that his object was to bring the question to a decision before the Supreme Court.

Upon this article, I remark: 1. There is no provision in the tenure-of-civil-office act against "an intent unlawfully to control the disbursements of the moneys appropriated for the military service and the Department of War," and no offence can be lawfully imputed of such an intention.

2. Under the constitutional provision that the President shall "take care that the laws be faithfully executed," the President may make and repeal army rules and regulations as to pay for extra service, there being no legislation on the subject, and he may lawfully exercise a general supervision and control over the acts of the Secretary and other subordinates as to the disbursement of moneys, as was determined by the Supreme Court of the United States in the case of the United States *vs.* Eliason, 16 Peters, 291; 14 Curtis, 304.

3. The President's powers, as declared by the Supreme Court of the United States, time and again, are such as we maintain that no offence can be predicated of these acts. Without citing all the decisions, I refer to the case of Wilcox *vs.* Jackson, 13 Peters, 498, where it is said that the President acts in many cases through the heads of departments, and the Secretary of War, having directed a section of land to be reserved for military purposes, the court presumed it to have been done by direction of the President, and held it to be by law his act; which, by the way, if I deemed it necessary, would be a very good authority to comment upon, in answer to the argument of the honorable managers, that no implication results in favor of the powers which are conferred upon the President under the Constitution. There is a case where, to all intents and purposes, the Supreme Court enforced the doctrine of implication in his favor, and held that it would be presumed that the Secretary had acted by direction of the President himself, and that that would be a sufficient protection to him.

The ninth article takes us into a somewhat different field; and I believe when we get there we part for a season at least with Mr. Stanton. The ninth article charges the President with instructing Brevet Major General Emory that a part of the act passed March 2, 1867, entitled "An act making appropriations," &c., and especially the second section thereof, directing that all orders from the President shall be issued through the General of the army, which had been promulgated by General Orders for the government of the army of the United States, was unconstitutional, with intent to induce Emory, as commander of the department of Washington, to violate the provisions of said act, and to obey the orders of the President, and also with intent to violate the act regulating the tenure of civil offices, and to prevent Stanton from holding the office of Secretary of War.

The answer to this ninth article sets out, in substance, the note of the 22d of February, requesting Emory to call, the object being to be advised as to the military changes made in the department of Washington which had not been brought to the respondent's notice. Emory called respondent's attention to the second section of the appropriation act. Respondent said it was not constitutional. The conversation is stated, and you have seen that there is no substantial difference, as I understand it, between the conversation as set out in the President's answer and the conversation as stated by General Emory himself. The President says that he did not order or request Emory to disobey any law; that he merely expressed an opinion that the law was in conflict with the Con-

Digitized by Google

stitution; and General Emory sustains that to all intents and purposes, for, when the subject was introduced, General Emory interrupted the President, and called his attention to this appropriation act.

I have to say in reference to this ninth article, that the Constitution, article two, section two, with which you are all familiar, provides that "the President shall be commander-in-chief of the army and navy of the United States and of the militia of the several States when called into the actual service of the United States." The object of this provision, without turning to the cases and taking up your time in reading them, as is stated in 1 Kent, 283; 3 Eliot's Debates, 103; Story on the Constitution, sections 1491 1492; and 5 Marshall's Life of Washington, pages 583 to 588, was to give the exercise of power to a single hand. In Captain Meigs's case Mr. Attorney General Black—and I presume from the eulogy passed upon Mr. Attorney General Black by the honorable manager yesterday, his opinion now, at any rate, ought to be a very authoritative opinion—in 9 Opinions, 468, says:

As commander-in-chief of the army, it is your right to decide, according to your judgment, what officer shall perform any particular duty, and as the supreme Executive Magistrate you have the power of appointment. Congress could not, if it would, take away from the President, or in any wise diminish, the authority conferred on him by the Constitution.

Mr. Story, in his Commentaries, volume three, section 1485, quoting from the Federalist, No. 74, says that—

Of all the cases and concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist except when a single magistrate is intrusted exclusively with the power.

In section 1486 he says:

The power of the President, too, might well be deemed safe, since he could not of himself declare war, raise armies, or call forth the militia, or appropriate money for the purpose; for these powers all belong to Congress.

Chancellor Kent, in his Commentaries, page 282, says:

The command and application of the public force to execute law, maintain peace, and resist foreign invasion, are powers so obviously of an executive nature and require the exercise of qualities so characteristical of this department that they have always been exclusively appropriated to it in every well organized government upon the earth.

He shows the absurdity of Hume's plan of giving the direction of the army and navy to one hundred senators; of Milton's, of giving the whole executive and legislative power to a single permanent council of senators; and Locke's, to a small oligarchical assembly.

In the case of the United States *vs.* Eliason, already cited, (16 Peters, 291,) it is said:

The President has unquestioned power to establish rules for the government of the army, and the Secretary of War is his regular organ to administer the military establishment of the nation, and rules and orders promulgated through him must be received as the acts of the Executive, and as such are binding on all within the sphere of his authority.

Senators, I maintain that there is no proof here to show, in the first place, that there was any unlawful or improper conversation between the President and General Emory. Mr. Manager Butler, with that fertility of invention which he has so eminently displayed at every stage of this proceeding, argues that it was either to bring about a civil war by resisting a law of Congress by force, or to recognize a Congress composed of rebels and northern sympathizers, that this conversation was had. Now, let us look to the circumstances under which the conversation took place. Mark you, an angry correspondence with General Grant had occurred from the 25th of January to the 11th of February, 1868. The President had charged, or intimated, at least, in the course of that correspondence, that he regarded General Grant as manifesting a spirit of insubordination. The removal of Mr. Stanton took place on the 21st of February. The Senate's resolution of the 21st of February, disapproving of the removal of Stan-

Digitized by Google

ton, was sent to the President, and the President sent a formal protest or message in response on the 24th of February.

I have not brought in newspapers here, senators, and I do not intend to bring them in, because the facts that I am about to state are so fresh in your recollection. Without going into any minutiæ of detail, it is enough for me to say, in general terms, that on the manifestation of this unfortunate difference—for, no matter who is right or who is wrong about it, it is an unfortunate thing that there is a difference of opinion between the Chief Executive of the nation and the Congress, or any part of the Congress, of the United States; it is a matter to be regretted that such a difference of opinion exists among you; but when this correspondence occurred, when these resolutions were offered in the Senate and the House, if my memory does not fail me—and I do not think it possible it can in the short interval of time that has elapsed—there was telegram upon telegram, offer upon offer, made on the one side to Congress to support them, and on the other side to support the President.

The Grand Army of the Republic—the "G. A. R."—seemed to be figuring upon a large scale, and if there had not been the exercise of a very great prudence on the part of Congress, and a very great prudence on the part of the President of the United States himself, we should have had this country enveloped in the flames of civil war. I hope, senators, no matter what opinion you may entertain upon that subject; no matter who you may think was the strongest—and God forbid that the country should ever have any occasion to test who has the greatest military power at its command, the Congress of the United States or the President of the United States—I say, without entering upon such question as that, which we all ought to view with horror, do give to the President of the United States the poor credit of believing that he has some friends in this country; that there are persons in the different States who would have been willing to rally around him. If an unfortunate military contest had occurred in the country, how it would have resulted the Great Being above us only knows.

All that I claim for the President of the United States is that whether he had few or many forces at his command, your President, as I told you upon the first day I came here, has manifested a degree of patriotic forbearance for which the worst enemy he has on the face of the earth ought to give him credit. If he was a tyrant, if he was a usurper, if he had the spirit of a Cæsar or of a Napoleon, if his object was to wrest the liberties of this country, your President could very easily have sounded the tocsin of war, and he could have had some kind of a force, great or small, perhaps, to rally around him. But, instead of doing that, he comes here through his counsel before the Senate of the United States; and although he and his counsel, or at least I as one of them—I do not undertake to speak for the other gentlemen—honestly believe that under the Constitution of the United States organizing the Senate and the House of Representatives, the House of Representatives as at present constituted, with fifty representatives from ten of the southern States absent, has no power to present articles of impeachment; and although he believes, as I do most conscientiously, that the Senate, as at present constituted, with twenty senators absent from this chamber who have a right to be here, has no power to try this impeachment, he makes no objection to your proceeding to try him. I shall not argue the question I have just suggested, for, in view of the almost unanimous vote against the resolution of Senator Davis, I think it would be an idle consumption of time to do so. I only advert to it so that I may place upon record this fact.

I say that, although the President and one at least of his counsel entertained this opinion and doubt, whether the House of Representatives, as organized, has the right to present the charges, or the Senate, as organized, has the right to try them under the Constitution, which says that "no State shall be deprived of its equal suffrage in the Senate," yet the President, instead of resorting to war, the

Digitized by Google

President, instead of resorting to any of those acts of arbitrary tyranny and oppression which are resorted to by the ambitious man such as he is described to be, has come here, and, while he states the objection, through me, at least, as one of his counsel, yet, in a peaceable manner, in a quiet manner, he submits this question, as well as all others, to be judged by the Senate of the United States in its present organization. And will you not at least give him credit for some degree of forbearance? When gentlemen talk of his being a tyrant and a usurper, when they talk of his object and purpose in sending for General Emory, senators, do they prove any improper design upon his part? None on the face of the earth.

In this state of things, when the whole country was agitated and excited; when men's minds were aroused everywhere in the unfortunate division of parties in the United States to such an extent that they were offering troops on the one hand to sustain Congress and troops on the other hand to sustain the President, and when the General of the army and the President had differed in their opinions, I maintain that the very fact that the President has done nothing of a military character shows that he had no intentions to do the acts which are imputed to him. But when he saw these despatches, when he knew that there was a difference between General Grant and himself, when he knew that there were persons sending despatches through the newspapers, governors, it was said, and leading men in the various States, as to how they would stand up to the Congress of the United States in this controversy, it was natural, right, proper, within the legitimate scope of the powers conferred upon him by the Constitution, that he should send for this officer, that he should inquire what was the meaning of these new troops that were brought into the city of Washington.

He had a right to do it, and the fact that he did do it is no evidence of any unlawful intention or design upon his part; but it proves that he was endeavoring to understand, as it was his duty to understand as the Commander-in-chief of the army of the United States, what was the meaning of the introduction of these forces. How did he know but that General Grant in the progress of this quarrel might attempt to assume the powers of a military dictator? How did he know but that General Grant might be endeavoring to envelop, to surround him by troops and to have him arrested? Had he not a right to send for an officer? Had he not a right to inquire into the introduction of these military forces here? When he found that it was only a trivial force, when he found that there was no particular design on the part of anybody to violate the Constitution of the United States, his inquiry stopped; no effort was made upon his part to gather an army or to rally a force to go to war with the Congress of the United States, but he retains counsel, comes here by his counsel, and in a peaceful manner submits himself to the judgment of the American Senate. I said it to you on the first day that his counsel appeared here, that the history of the whole world does not furnish anything in moral sublimity and grandeur surpassing the trial in which you are now engaged.

I said then, and I repeat it now, that I was delighted and rejoiced to see that this unfortunate controversy was taking this turn. I regretted that any such controversy had originated; regretted that there was any such unhappy difference of opinion between the Congress of the United States and the President, but in view of these red-hot despatches that were pouring in upon both sides from every quarter of the United States, I did felicitate my country, and I felicitated you upon the thought that the President of the United States had come here through his counsel and that he was willing to abide the arbitrament of the American Senate, the sworn men of the Constitution, the judges of your own constitutional powers. You judge as any other court judges that undertakes to determine the question of its jurisdiction. Let you judge for yourselves whether you have the constitutional power to try him. He comes

Digitized by Google

before you in this peaceable and quiet mode; and I maintain, senators, that he is not justly chargeable with the imputations that are made against him, and that his conduct is a full answer to the entire argument that has been made by the gentlemen upon the other side. They may impute motives; they may say just as much as they please about the conversation with General Emory or anybody else; the President has brought no force here; he has not attempted, in any manner whatever, to overawe Congress; he has not attempted, in any manner whatever, to plunge this country into a revolution; he has acted peaceably and quietly, and the imputations that are made against him, as I insist, have no just foundation in the facts of the case. All the testimony shows—I shall not go into it in detail—that the President of the United States had it in view to have this question settled in a peaceable and amicable mode, that he contemplated no force, but designed that it should go before the Supreme Court.

The tenth article charges the President with making intemperate, scandalous, and inflammatory harangues and uttering loud threats and bitter menaces against Congress and the laws of the United States, which are particularly indecent and unbecoming in the Chief Magistrate of the United States, and have brought the high office of President into contempt, ridicule, and disgrace. The charge is that he did this and was guilty of a high misdemeanor in office; and the article specifies three speeches—one at the Executive Mansion, one at Cleveland, and one at St. Louis.

A great deal of testimony has been taken about those speeches. I might make an argument as to whether they are faithful representations of what the President said or not. I shall not weary your patience after having delayed you so long, with any argument upon that point.

The answer says that the first amendment of the Constitution provides that "Congress shall make no law abridging the freedom of speech or of the press." "Freedom" is defined to be personal and private; "liberty" to be public. We say, therefore, that this is a personal right in the President as a citizen. I say further that his speeches were not official, like his communications to Congress, but were private and personal and in answer to the call of his fellow-citizens.

Ten years ago it would have struck the American people with astonishment that such a charge should be preferred against the President of the United States. Almost from my boyhood down to the commencement of the war I have heard politicians talking time and again about what was known as the old sedition law; and if there ever was anything that stunk in the nostrils of the American people it was what was called the sedition law, the object of which was to prevent the publication of matter that might affect the President or the government of the United States. We in this country like to exercise the freedom of speech. Our fathers guaranteed it to us in the Constitution, and, like the liberty of the press, which is also another cherished right dear to every American citizen, we like to have the largest liberty in the exercise of the right. The American people have been accustomed to it ever since they were a nation; and it is a great deal better to tolerate even impropriety and indecency of speech, and to tolerate the licentiousness of the press, than it is to impose such restrictions as are imposed in other countries. Public opinion, as a general rule, will regulate and control the indecency of speech, and it will regulate and control the licentiousness of the press. If public opinion does not do it as a general rule, in a great many cases the arm of the law is long enough and it is strong enough to apply any corrective that may be necessary.

But the American people love to exercise the freedom of speech; and let it be known and remembered always that great as the powers of Congress may be, great as the powers of the President of the United States are, there is in a technical sense a body of men who have ever been admitted by all politicians and public men of the United States to be the sovereigns, the masters of both; that is, the people; they are the common constituents of Congress and of the

Digitized by Google

President. Members of Congress have the right to speak and to talk with perfect freedom of the conduct of the President, and, as we maintain, the President in turn has the right to "carry the war into Africa," and to speak about Congress whenever he is assailed; and if he does this in his private intercourse with the citizens of the United States, not in official intercourse, he has just the same right to do it that any other citizen has in our government; and whenever you destroy the right of the President of the United States to defend himself against charges that may be made against him either in Congress or out of Congress, then you put the President at the feet of Congress and you destroy that independence which was intended by the Constitution to be secured to each of the co-ordinate departments of the government in their appropriate sphere.

It was intended that the legislative department should be independent here and within the circle of its appropriate duties; that the judicial department should be, in like manner, independent in the exercise of the functions and powers properly and appropriately belonging to it, and that the President of the United States, as to all executive matters, should be equally independent, both of the judiciary and of the Congress of the United States; and to hold otherwise is to enable Congress, as we insist, to monopolize all the powers of the Constitution and to become ultimately a despotism such as never was contemplated by the fathers.

Now, senators, I do not intend to go minutely into this question, for I desire to close my remarks this evening, if you will have the patience to hear me to a close, and I shall try to close them at as early a period as I can. I do not intend to go minutely into the discussion of this question; but I have to say in regard to the President of the United States just as I said in regard to the House of Representatives: he is a mortal man; he is made of flesh and blood. The President of the United States has temper, passion, just like any other man. When things are said about him in Congress or anywhere else, pray let us know why it is that he may not defend himself. I believe it was the 31st of January, 1866, but I may be mistaken in the date, when the venerable leader, as he is called, of the House of Representatives, who had opposed the President's nomination at Baltimore, and, if I am not mistaken in the history of the country, had insisted there that the President was out of the United States, who never did favor him under any circumstances whatever, spoke in the House of Representatives of Charles I.

This was a few days before the President made one of the speeches that he has made in the course of this controversy. The President made a speech at the Executive Mansion on the 22d of February, 1866, in which he alluded to that, and in which he treated it as a sort of invitation to assassination. That imputation, so far as I know, was never noticed by the venerable manager in the House of Representatives at all. Other members of Congress assailed him. You had the right to do it; a perfect right to do it in the exercise of that freedom of speech and of that power of deliberation that belonged to you; a perfect right to say anything you pleased of the President of the United States.

But when these things were said by members of Congress, when they were published and circulated all over the land, spread broadcast in the newspapers, what is there in the Constitution, what is there in the position of the President of the United States, that ties his hands and prevents him from exercising the ordinary right of self-defence that belongs to any other citizen of the land? I admit that the President of the United States in a communication made officially to Congress ought to observe proper decorum, that he ought to observe that amenity of expression, if I may use such a phrase, as should be employed in the intercourse between one department of the government and another; but I maintain that when Andrew Johnson makes a tour from Washington city to Chicago and Cleveland, and St. Louis, and Cincinnati, and returns to the city of Washington, he is nothing but a private citizen.

Digitized by Google

To be sure, he is President of the United States; but nothing in the Constitution, nothing in the laws of the land, undertakes to regulate his movements under such circumstances. He goes as a private citizen; and when he goes, if he is called out to make a speech as he was called out to make it by the people, and he chooses to answer the call, and if some severe philippics have been uttered against him by members of Congress, and he chooses to answer them; if members of Congress have insisted in the strongest sort of terms on their right to hold this doctrine or that doctrine or the other doctrine, why may not the President of the United States answer these things in the same way, appealing as he does to the people, who are the common constituents of both? Who would deny to any senator or any representative the right when he goes home, or when he goes anywhere else within the limits of the magnificent territory that now constitutes the United States of America—who would have the assurance and the presumption to deny the power of any one of you, either in what is ordinarily called a stump speech or in any other mode of communication, to assail the conduct of the President of the United States? Why, senators, this very thing of the freedom of discussion, although in heated political contests it is often carried to an improper extent, is the very life and salvation of the Republic. This thing of having parties in our land, although party spirit seems to have culminated in some of those dangers which were apprehended by Washington in his Farewell Address, and having parties a little more equally divided than they have been within the last three or four years in the United States, is essential to the preservation of the liberty of the American citizen. When parties are nearly equally balanced they watch each other, and they are sedulously cautious in regard to anything that may violate the Constitution of the United States.

I will not, as I have said, go minutely into the testimony on this matter; but I believe it has been proved, in regard to every one of those occasions, that it was an occasion sought not by the President, but by others. It is fresh in your recollection that when Mr. Senator Johnson and others called upon the President at the Executive Mansion they called upon him in their character of citizens, and he replied to them as he had a right to reply to them. When he went to Cleveland the proof shows that he did not desire to do anything more than to make a brief salutation to the people and leave them, but he was urged by his friends to do more; and I think it very likely, senators, from my knowledge—and I am appealing to your own knowledge of the manner in which things are done in our country—I think it very likely, from the circumstances which are detailed here in evidence, and especially from the report of the speech itself, that there was a mob there at Cleveland, ready cut and dried, and prepared to insult and to assail the President of the United States, in the manner they did do, and to prevent him, if possible, from being heard. So, when they gave him provocation, he replied just as any other man would do, and just as any other man had the right to do; and if he did make use of strong expressions in regard to the Congress of the United States, his expressions were not stronger than he had the right to use. Without discussing the question who was right or who was wrong, and insisting as I do upon the freedom of speech, I maintain this. So when he went to St. Louis, he was again urged by his friends, according to the testimony, to go out and address the people. He had no desire to do so; he was urged and urged again by his friends, under whose control he had placed himself, to go there and answer their call; and is it not natural in a free government like ours that the President of the United States should associate with the people; and when they make a call on him to address them is there anything improper and unreasonable in his doing it? And if when he addresses them a prepared mob intends to insult him; if they excite his passions, as the passions of any man would be excited under the circumstances, and he answers them a little intem-

perately and somewhat in their own way, speaks about the Congress of the United States pretty freely, pray tell us what sort of treason is committed? Does the Congress of the United States hold itself up so far above the President and the people of the United States as to say that your acts are not subject to criticism either by the President or by anybody else that chooses to criticise them? I tell you, senators, we have not got that far yet. The President, any citizen of the United States of America, from the President down to the humblest citizen, has the right to criticise any act of Congress that he chooses to criticise, and he has the right to speak of any act of Congress in any mode that he sees proper to speak; and if the people will tolerate it there is no law and nothing in the Constitution to prevent it; and if this power of free speech, as I said before, is improperly exercised, then the corrective must be in the people themselves. So I say that one of the greatest rights secured to the people under the Constitution of this country would be invaded if this article was sustained.

The eleventh article charges that on the 18th of August, 1866, the defendant asserted that the 39th Congress was not a lawful Congress, denied that it had the right to recommend constitutional amendments, and in pursuance thereof removed Stanton on the 21st of February, 1868, to prevent the execution of the tenure-of-civil-office act, and to prevent the execution of the army appropriation bill, and prevent the execution of the act for the more efficient government of the rebel States. The honorable manager, Mr. Butler, referred to the President's admission that he attempted to prevail on General Grant to disobey the law, to his admission that he intended from the first to oust Mr. Stanton, his order to Grant not to recognize Stanton, his order to Thomas to take possession, &c. In answer to all this I have to say that the honorable manager admits that if the Senate shall have decided that all the acts charged in the preceding articles are justified by law, then so large a part of the intent and purpose with which the respondent is charged in this article would fail of proof that it would be difficult to say whether he might not with equal impunity violate the laws known as the reconstruction acts; and as we have shown that the President is entitled to an acquittal on the other charges, he must be entitled to a judgment or verdict of not guilty upon this. But we say that none of the acts charged amount to a high crime or misdemeanor; that he had the right to deny the authority of Congress as he had previously done in his messages. I have them here, but I shall not turn to them.

Time and again the President, in his veto messages especially, has asserted, in his communications to Congress, his views and opinions as to the rights of the southern States that are excluded from representation; and although the phraseology is a little more courtly and elegant in the messages than it was in the several speeches which have been referred to, yet, so far as the substance is concerned, the President, in almost every one of those communications, has asserted his belief that the southern States are entitled to representation, and that they ought not to be excluded by Congress.

We say that none of the acts charged amount to a high crime or misdemeanor; that he had the right to deny the authority of Congress as he had previously done in his messages; that he had the right, as President, to instruct General Grant, who is his subordinate, bound to obey his commands, to disobey a law which he believed to be unconstitutional, or test its validity in the courts of law; that he had the right to remove Stanton and to order Thomas to take possession of the War Office; that he had the right to differ in opinion with Congress, and to answer the telegraphic despatch of Governor Parsons as he did.

I ask, have not members of Congress during all administrations, commencing with the administration of General Washington, been accustomed to assail the measures of every President, both in Congress and out of it? And may not the President vindicate and endeavor to sustain his own views before the people

in opposition to Congress? And can he not with propriety say to members of Congress when they oppose his views, "You are assailing the executive department," with just as much propriety as they can say that he is assailing the legislative department? The obligation to support the Constitution is equally obligatory on both, and both have the right under this and all other circumstances to appeal to their common sovereigns, the people, with a view of procuring a final and authoritative settlement of the controversy.

Senators, I had intended to notice, and I will now, with your indulgence, very briefly notice, one or two of the observations of the honorable manager who last addressed you. He said that the President's object was to obtain control of the army and navy, and regulate the elections of 1868 in the ten southern States, so as to let the rebels exercise the elective franchise and exclude negroes from voting. What authority in the proof in this case had the honorable gentleman upon which to make that assertion? He said that the south had been given up to rapine, bloodshed, and murder by the President's policy. Why, senators, under whose control is the south? Is not the south under the control of Congress? Is it not under the control of army officers appointed by the President of the United States in pursuance of an act of Congress which he had attempted to veto? And who was responsible for this? I live in the south; and the statement which I am about to make will go just for what you think it is worth, much or little; but my observation ever since the close of the war is, that although there has been a bad state of things in some portions of the southern States, nine-tenths of the murders and assassinations that have been reported in the newspapers and talked about here in Congress are made to order, got up for political effect, with a view of keeping up agitation and excitement, and that there is no warrant or foundation for the charge that the President has given up the south to any such condition of affairs.

It has been said, senators, that the President takes the place of Charles I, and Stanton the place of John Hampden. I am glad that the manager did some justice to Mr. Stanton before he got through. He placed him in the condition of a "serf," as I showed you a while ago, and I am glad that he wound up with Mr. Stanton by showing or asserting that he was entitled to the reputation of John Hampden; but as to the President being Charles I, or as to his assuming any powers that are not warranted by the Constitution of the country, I have endeavored in my feeble and imperfect way to show you that he is not guilty.

Senators, many other things might be said; but I have already occupied your time much longer than I had designed to do, or would have done if I had had a little more notice beforehand that I should be permitted to address you at all. I stated to you when I asked for the privilege of addressing you that I had no written speech, nothing but notes and memoranda which I had not an opportunity even to regulate or to put into something like order to address you. Therefore, what I have said has been said under some disadvantages. I only regret that it has not been more worthily said. Now, before I take my seat let me say to you, you have this whole case before you. I say to you now toward its conclusion, as I said at its commencement, that a high and solemn duty rests upon you, senators of the United States. I have the same faith now that I have expressed ever since I undertook this case and that I expressed so fully yesterday. I do believe that confidence ought to be reposed in the American Senate. I do believe that men of your character and your position in the world have the ability to decide a case impartially, and to set aside all party considerations in its determination. I believe it, and I trust that the result will show that the country has a right to believe it.

Every lawyer, every judge in the United States, is familiar with the fact that a great many cases are put in the law books and especially in works on evidence, rather as a caution to judges and jurors than anything else, as to

Digitized by Google

improper and unjust verdicts that have been rendered in times past. Every lawyer knows that cases are reported in the books where men, especially upon circumstantial evidence, have been tried and executed for murder and other offences, and who it afterward appeared upon a more careful investigation, were not guilty of the offences imputed to them. These cases are not put in the books for the purpose of frightening judges and juries from their propriety, but they are put in for the purpose of causing them to exercise a salutary degree of caution in the powers which are conferred upon them. So without going over these things in detail, I may say that I think even the Senate of the United States may look back upon the history of the world for the purpose of deriving the same instructive lessons that are intended in law books to be impressed upon the courts and juries of the land. Without undertaking to travel along the whole course of history, some three or four examples have occurred that are not unworthy of a passing notice before I take my seat.

Without going into the details, every senator is fully informed of the account which has been transmitted to us in history of the murder of Cæsar by Brutus; and for nearly twenty centuries it has been a question whether that act was an act of patriotism, and whether it was justified or not. The execution of Charles I is another of the historical problems which have probably not been settled, and never will be satisfactorily settled in the opinions of mankind. Some regard Cromwell as a patriot, as a man animated by the purest and most correct motives; others look upon him as being an ambitious man, who designed to engross power improperly into his own hand. That question still remains open. But these deeds of violence which have been done in the world have not always been followed by peace or quiet to those who have done them. A few short years after the execution of Charles I, the bodies of Cromwell and Bradshaw, and one or two others who were concerned in that execution, were, in consequence of a change of public sentiment in England, taken from their graves and they were hung, in terror and in hate and execration by the party that came into power.

Louis XVI was executed by the people of France. Did that act give peace and quiet to the French kingdom? No; it was soon followed by deeds of bloodshed such as the world never saw before. The guillotine was put in motion, and the streets of Paris, it is said, literally ran with human gore. Most of those who were concerned in the trial of Charles I were executed. Three of them came to America and sought refuge in the vicinity of New Haven. They were compelled to hide themselves in caves. Their graves were not known to those in whose midst they lived, or are but little known.

These deeds of violence, done in times of high party and political excitement, are deeds that should admonish you as to the manner in which you discharge the duty that devolves upon you here. This thing of being rid of the Chief Magistrate of the land in the mode that is attempted here may be fraught with consequences that no man can foresee. I have no idea that it will be fraught with such consequences as those I have described; and yet deeds that are done in excitement often come back in future years, and cause a degree of feeling which it is not, perhaps, proper for me, on this occasion, to describe; it has been done a great deal better by a master hand, who tells us:

"But ever and anon of griefs subdued,
There comes a token like a scorpion's sting,
Scarce seen, but with fresh bitterness imbued,
And slight withal may be *the things* which bring
Back *on* the hearts the weight which it would fling
Aside forever; it may be a sound—
A tone of music—summer's eve—or spring—
A *flower*, the wind, the ocean which shall wound,
Striking the electric chain wherewith we are darkly bound,
And how and why we know not, nor can trace
Home to its cloud this lightning of the mind,
But feel the shock renewed—nor can efface
The blight and blackening which it leaves behind."

Digitized by Google

God grant that the American Senate shall never have such feelings as these. God grant that you may so act in the discharge of your duty here that there shall be no painful remembrance, senators, to come back on you in your dying hour. God grant that you may so act that you cannot only look death, but eternity in the face, and feel that you have discharged your duty and your whole duty to God and your country. And if you thus act, you will, I am sure, act in such manner as to command the approbation of angels and of men, and the admiration and applause of the world and of posterity who are to come after us.

Mr. Chief Justice and Senators, you and each of you, personally and individually, have struggled through life until you have reached the positions of eminence you now occupy. It has required time and study and labor and diligence to do so; but, after all, the fame which you have acquired is not your own. It belongs to me; it belongs to others. Forty million American citizens are tenants in common of this priceless property. It is not owned alone by you and your children. We all have a direct and immediate interest in it. Whatever strife may have existed among us as a people; whatever of crimination and recrimination may have been engendered amid the fierceness of party passion, yet in the cool moments of calm reflection every true patriot loves his country as our common mother, and points with just pride to the hard-earned reputation of all her children. Let me invoke you, therefore, in the name of all the American people, to do nothing that may even seem to be a stain upon the judicial ermine, or to dim, for a moment, the bright escutcheon of the American Senate. The honorable manager who addressed you on yesterday [Mr. Boutwell] referred in eloquent terms to Carpenter's historical painting of emancipation. Following at an humble distance his example, may I be permitted to say that I have never entered the rotunda of this magnificent and gorgeous Capitol when I have not felt as if I were treading upon holy ground; and I have sometimes wished that every American sire could be compelled by law and at the public expense to bring his children here, at least once in their early years, and to cause them to gaze upon and to study the statuary and paintings which, at every entrance and in every hall and chamber and niche and stairway, are redolent with the history of our beloved country. Columbus studying the unsolved problem of a new world, and the white man and Indian as types of the march of civilization, arouse attention and reflection at the threshold. Within, the speaking canvas proclaims the embarcation of the Pilgrim Fathers. Their sublime appeal to the God of oceans and of storms; their stern determination to seek a "faith's pure shrine" among the "sounding aisles of the dim woods," and "freedom to worship God;" and the divine, the angelic countenance of Rose Standish as she leans, with woman's love, upon the shoulder of her husband, and looks up, with woman's faith, for more than mortal aid and guardianship, so fixes and rivets attention,

> That, as you gaze upon the vermil cheek,
> The lifeless figure almost seems to speak.

And there is the grand painting that represents Washington, the victor, surrendering his sword after having long before refused a crown—one of the sublimest scenes that earth has ever seen, presenting, as it nobly does, to all the world the greatest and best example of pure and unselfish love of country. Not to speak of other teeming memories which everywhere meet the eye and stir the soul, as I sat a few days since gazing upward upon the group (Washington and the sisterhood of early States) who look down from the topmost height of the dome, methought I saw the spirits of departed patriots rallying in misty throngs from their blissful abode and clustering near the wondrous scene that is transpiring now; and as I sat, with face upturned, I seemed to see the shadowy forms descend into the building and arrange themselves with silent but stately preparation in and around this gorgeous apartment. I have seen them, in

imagination, ever since! I see them now! Above and all around us. *There* in the galleries, amid those living forms of loveliness and beauty, are Martha Washington and Dolly Madison and hundreds of the maids and matrons of the Revolution, looking down with intense interest and anxious expectation, and watching with profoundest solicitude the progress of the grandest trial of the nineteenth century. And *there*, in your very midst and at your sides, are sitting the shades of Sherman and Hamilton, Washington and Madison, Jefferson and Jackson, Clay and Webster, who in years that are past bent every energy and employed every effort to build our own great temple of liberty, which has been and will continue in all time to be the wonder, the admiration, and the astonishment of the world. If there be joy in heaven over one sinner that repenteth, and if the shades of Dives and Lazarus could commune across the great gulf with each other, it is no wonder that the spirits of departed patriots are gathered to witness this mighty inquest, and that they are now sitting with you upon this, the most solemn of all earthly investigations. Behind the Chief Justice I see the grave and solemn face of the intrepid Marshall; and above, among, and all around us are the impalpable forms of all the artists of our former grandeur! Mr. Chief Justice and Senators, if you cannot clasp their shadows to your souls, let me entreat you to feel the inspiration of their sacred presence; and as you love the memory of departed greatness; as you revere the names of the patriot fathers; and as you remember the thrilling tones of the patriot voices that were wont to speak "the thoughts that breathed and the words that burned" with deathless love for our institutions and our laws, so may you be enabled to banish from your hearts every vestige of prejudice and of feeling, and to determine this great issue in the lofty spirit of impartial justice, and with that patriotic regard for our present and future glory that ever prompted the action of the purest and best and greatest names that, in adorning our own history, have illuminated the history of the world. And when the day shall come—and may it be far distant—when each of you shall "shuffle off this mortal coil," may no thorn be planted in the pillow of death to imbitter your recollection of the scene that is being enacted now; and when the time shall come, as come it may, in some future age, when your own spirits shall flit among the hoary columns and chambers of this edifice, may each of you be then enabled to exclaim—

Here I faithfully discharged the highest duty of earth; here I nobly discarded all passion, prejudice, and feeling; here I did my duty and my whole duty, regardless of consequences; and here I find my own name inscribed in letters of gold, flashing and shining, upon the immortal roll where the names of all just men and true patriots are recorded!

I do not know, Mr. Chief Justice, that it is exactly in accordance with the etiquette of a court of justice for me to do what I propose to do now; but I trust that you and the Senate will take the will for the deed, and if there is anything improper in it you will overlook it. I cannot close, sir, the remarks which I have to make in this case, without returning my profound thanks to the Chief Justice and the senators for the very kind and patient attention with which they have listened to me on this occasion. Imperfect as the argument has been, and lengthy as it has been, you have extended to me the patient attention which I had little reason to expect, and I cannot, senators, take my seat without returning my thanks to you, whether it be according to the usage of a court like this or not.

On motion of Mr. TIPTON, the Senate, sitting for the trial of the impeachment, adjourned.

Digitized by Google

SATURDAY, *April* 25, 1868.

The Chief Justice of the United States took the chair.

The usual proclamation having been made by the Sergeant-at-arms,

The managers of the impeachment on the part of the House of Representatives and the counsel for the respondent, except Mr. Stanbery, appeared and took the seats assigned to them respectively.

The members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

The CHIEF JUSTICE. The Secretary will read the journal of yesterday's proceedings.

The journal of yesterday's proceedings of the Senate, sitting for the trial of the impeachment, was read.

The CHIEF JUSTICE. The first business this morning is the order proposed by the senator from Vermont, [Mr. Edmunds.] The clerk will read the order.

Mr. EDMUNDS. Mr. President, at the request of several senators who desire to consider the question, I move that the consideration of the order be postponed until Monday morning.

Mr. DRAKE. Mr. President, I move that the order be indefinitely postponed.

Mr. SUMNER. That is better.

Mr. DRAKE. And on that motion I call for the yeas and nays.

Mr. EDMUNDS. So do I, Mr. President.

The CHIEF JUSTICE. The motion for indefinite postponement takes precedence of the motion to postpone to a day certain; and upon that question the yeas and nays are demanded.

The yeas and nays were ordered.

Mr. CONKLING. I wish to inquire what was the motion of the senator from Vermont?

The CHIEF JUSTICE. The senator from Vermont moved to postpone until Monday; the senator from Missouri moves to postpone indefinitely; and the question now is upon the indefinite postponement.

Mr. SHERMAN. I should like to have the order read.

The CHIEF JUSTICE. The clerk will read the order.

The chief clerk read as follows:

Ordered, That after the arguments shall be concluded, and when the doors shall be closed for deliberation upon the final question, the official reporters of the Senate shall take down the debates upon the final question to be reported in the proceedings.

The question being taken by yeas and nays on Mr. Drake's motion, resulted—yeas, 20; nays, 27; as follows:

YEAS—Messrs. Cameron, Chandler, Conkling, Corbett, Drake, Ferry, Harlan, Howard, Morrill of Maine, Morrill of Vermont, Morton, Nye, Pomeroy, Ramsey, Ross, Stewart, Sumner, Thayer, Tipton, and Yates—20.

NAYS—Messrs. Anthony, Buckalew, Cragin, Davis, Dixon, Doolitle, Edmunds, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Howe, Johnson, McCreery, Morgan, Norton, Patterson of Tennessee, Saulsbury, Sherman, Trumbull, Van Winkle, Vickers, Willey, Williams, and Wilson—27.

NOT VOTING—Messrs. Bayard, Cattell, Cole, Conness, Patterson of New Hampshire, Sprague, and Wade—7.

So the order was not indefinitely postponed.

The CHIEF JUSTICE. The question recurs on the motion of the senator from Vermont to postpone the order until Monday.

The motion was agreed to.

Mr. SUMNER. Mr. President, I send to the Chair an order which I desire to have read.

The CHIEF JUSTICE. The Secretary will read the order.

Digitized by Google

The chief clerk read as follows:

Ordered, That the Senate, sitting for the trial of Andrew Johnson, President of the United States, will proceed to vote on the several articles of impeachment at 12 o'clock on the day after the close of the arguments.

Mr. SUMNER. If the Senate is ready to act on it——

The CHIEF JUSTICE. The order is for present consideration, unless objected to.

Mr. JOHNSON. I object.

The CHIEF JUSTICE. Being objected to, it lies over.

Mr. SUMNER. Mr. President, I send to the Chair two additional rules, the first of which is derived from the practice of the Senate on the trials of Judge Chase and Judge Peck.

The CHIEF JUSTICE. The Secretary will read both of the additional rules proposed.

The chief clerk read as follows:

RULE 23. In taking the votes of the Senate on the articles of impeachment the presiding officer shall call each senator by his name, and upon each article propose the following question, in the manner following: "Mr. ———, how say you, is the respondent, ———, guilty or not guilty as charged in the —— article of impeachment?" whereupon each senator shall rise in his place and answer "guilty" or "not guilty."

RULE 24. On a conviction by the Senate, it shall be the duty of the presiding officer forthwith to pronounce the removal from office of the convicted person according to the requirement of the Constitution. Any further judgment shall be on the order of the Senate.

The CHIEF JUSTICE. Is the Senate ready for the consideration of these rules now?

Mr. JOHNSON. I object.

The CHIEF JUSTICE. Objection is made; they will lie over. [After a pause.] Gentlemen of counsel for the President, you will please proceed with the argument in his defence.

Hon. WILLIAM S. GROESBECK addressed the Senate on behalf of the respondent, as follows:

Mr. CHIEF JUSTICE and SENATORS: I am sorry that I am not so well to-day as I should like to be; but I know the desire of the Senate to get on with this argument, and I have, therefore, preferred to come here this morning in the condition I am, and attempt to present an outline, at least, of the views I have formed of the respondent's case.

Since the organization of our government we have had five trials of impeachment—one of a senator and four of judges, who held their office by appointment and for a tenure that lasted during life or good behavior. It has not been the practice, nor is it the wise policy, of a republican or representative government to avail itself of the remedy of impeachment for the control and regulation of its elective officers. Impeachment was not invented for that purpose, but rather to lay hold of offices that were held by inheritance and for life. And the true policy of a republican government, according to my apprehension, is to leave these matters to the people. They are the great and supreme tribunal to try such questions, and they assemble statedly with the single object to decide whether an officer shall be continued or whether he shall be removed from office.

I may be allowed, senators, to express my regret that such a case as this is before you; but it is here, and it must be tried, and therefore I proceed, as I promised at the outset, to say what I may feel able to say in behalf of the respondent.

In the argument of one of the managers the question was propounded:

Is this body, now sitting to determine the accusation of the House of Representatives against the President of the United States, the Senate of the United States or a court?

The argument goes on to admit:

If this body here is a court in any manner as contradistinguished from the Senate, then we agree * * * * that the accused may claim the benefit of the rule in criminal cases,

that he may only be convicted when the evidence makes the case clear beyond reasonable doubt.

In view of this statement, and in view of the effort that has been made by the managers in this cause, I ask, senators, your attention to the question, in what character do you sit on this trial? We have heard labored and protracted discussion to show that you did not sit as a court; and the managers have even taken offence at any such recognition of your character. For some reason I will not allude to they have done even more, and claimed for this body the most extraordinary jurisdiction. Admitting that it was a constitutional tribunal, they have yet claimed that it knew no law, either statute or common; that it consulted no precedents save those of parliamentary bodies; that it was a law unto itself; in a word, that its jurisdiction was without bounds; that it may impeach for any cause, and there is no appeal from its judgment. The Constitution would appear to limit somewhat its jurisdiction, but everything this tribunal may deem impeachable becomes such at once, and when the words "high crimes and misdemeanors" are used in that instrument they are without signification and intended merely to give solemnity to the charge.

To sustain this extraordinary view of the character of this tribunal we have been referred to English precedents, and especially to early English precedents, when, according to my recollection, impeachment and attainder and bills of pains and penalties labored together in the work of murder and confiscation. Senators, I do not propose to linger about these English cases. We have cases of our own upon this subject; we have teachings of our own. This we know: our fathers, in framing the Constitution, were jealous of delegating their power, and tried to make a limited constitutional government; tried to enumerate all the power they were willing to intrust to any department of it. The executive department is limited; the judicial department is limited; and the legislative department, we have supposed, was also limited; but according to the argument made here on this trial it is otherwise, and it has in its service and at its command an institution that is above all law and acknowledges no restraint; an institution worse than a court-martial, in that it has a broader and more dangerous jurisdiction. Senators, I cannot believe for one moment that there is lying in the heart of the Constitution any such tribunal as this; and I invite your attention to a brief examination of our own authorities and of our own teachings upon this subject.

It was with much doubt and hesitation that the jurisdiction to try impeachment at all was intrusted to the Senate of the United States. The grant of this power to this body was deferred to the last moment of time. Nor was your jurisdiction overlooked. Allow me to call your attention very briefly to the proceedings of the Federal Convention upon this subject as recorded in the journal of that body. In the first report that was presented it was proposed to allow impeachment for "malpractice or neglect of duty." It will be observed that this was very English-like and very broad in the jurisdiction proposed to be conferred. There is not necessarily any crime in the jurisdiction here proposed to be conferred. In the next report it was proposed to allow the tribunal jurisdiction for "treason, bribery, and corruption." It will be observed that they began to get away from the English precedents and to approach the final results at which they arrived. The jurisdiction here proposed was partly criminal and partly broad and open, not necessarily involving penal liability. In the next report it was proposed that impeachment should be allowed for "treason or bribery"—nothing else. It will be observed that here was nothing but gross, flagrant crime. This jurisdiction was considered too limited, and was opened, and that gives us the jurisdiction we have in the present constitution, "treason, bribery, or other high crimes and misdemeanors"—no malpractice, no neglect of duty, nothing that left the jurisdiction open. The jurisdiction is shut and limited by any fair construction of this language; and it was intended to be

Digitized by Google

shut. It is impossible to observe the progress of the deliberations of the Convention upon this single question, beginning with the broadest and most open jurisdiction, and ending in a jurisdiction defined in these technical terms of law, without coming to the conclusion that it was their determination that the jurisdiction should be circumscribed and limited.

But in what character, senators, do you sit here? You have heard the argument of the managers; you have heard their frequent discussions upon this subject all through the progress of the cause, appealing to English precedents to maintain the position that you sit here not as a court, but as an inquest of office or as some nameless tribunal with unbounded and illimitable jurisdiction. Now, we have precedents, our own precedents upon this subject; and let me call your attention to them for a few moments.

But, before doing so, I desire to say that it has been heard for the first time in this trial that this tribunal, sitting as you are sitting, was anything else than a court. I challenge the gentlemen in all the investigations they may have made of the action of the constitutional convention, of the utterances of jurists, or of anything that has been said or done to throw light upon this inquiry, to produce anything calculated to make the impression that the tribunal that tried impeachment was anything else than a court.

Let us look, senators, to our own precedents. We have had five trials of impeachment in the United States. The first was the case of Blount. What was the language of the tribunal in that trial—not of counsel, but of the tribunal itself? What was its language upon this identical question? Hear it. When they came to give their final decision they did it in this language:

The *court* is of opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this *court* ought not to hold jurisdiction of the said impeachment, and that the said impeachment be dismissed.

That is good authority. It is good American precedent upon this question. It is the deliberate opinion of the Senate of the United States in the first trial in which it sat in this capacity, declaring itself in the most solemn language it uttered throughout the trial, its final decision, to be a court, and not an inquest of office or some nameless thing that by reason of its mystery is calculated to frighten or at least to confuse.

What was the next case? The Pickering case. I am referring now to the appendix to volume three of the Senate Journal. On pages 489 and 507 the language of the body will be found on this subject in the following form: in its process, its own language, it styles itself "the Senate sitting in their capacity of a court of impeachment," and the last action of the body, their decision, was upon the question in this form:

Is the *court* of opinion that John Pickering be removed?

So, too, in the next, the Chase trial. The President in that case styles the body a "court," and, more fortunate than the Chief Justice in this, escaped all censure from the managers of the House of Representatives.

In the next, the case of Peck, the tribunal itself took the final vote under its own resolution in this language:

Resolved, That this court will now pronounce judgment in the case of James H. Peck, judge of the United States court for the district of Missouri.

In the case of Judge Humphreys, in 1862, the Senate styled itself in all its proceedings "the high court of impeachment."

Senators, I have gone over every precedent we have in our own history upon this question, and I show that in every instance the body, the Senate, in those trials, solemnly declared itself to be a court. If we are to go for precedents, let us take our own rather than the precedents from abroad, which have been so liberally quoted by the managers on this occasion.

In what spirit, senators, should you try this case? Allow me to refer you upon this subject to the language of Story in his Commentaries on the Consti-

tution, to be found on page 216, section 743. I beg your attention to this language of Justice Story upon the question which I have just propounded:

The great objects to be attained in the selection of a tribunal for the trial of impeachments are impartiality, integrity, intelligence, and independence. If either of these be wanting the trial must be radically imperfect. To secure impartiality the body must be in some degree removed from popular power and passions, from the influence of sectional prejudice, and from the more dangerous influence of party spirit. To secure integrity there must be a lofty sense of duty and a deep responsibility to future times and to God. To secure intelligence there must be age, experience, and high intellectual powers as well as attainments. To secure independence there must be numbers as well as talents, and a confidence resulting at once from permanency of place, dignity of station, and enlightened patriotism.

On the next page he adds:

Strictly speaking, the power—

That is, the power of impeachment—

partakes of a political character; and on this account it requires to be guarded in its exercise against the spirit of faction, the intolerance of party, and the sudden movements of popular feeling.

Senators, this is not my language; it is the language of a distinguished jurist whom you all respect. While it is not mine, I affirm, by all our own authorities, by our own teachings on this subject, that it is a true and faithful portraiture of what is meant in the Constitution by the tribunal which tries impeachments. And for this very purpose you have been sworn anew to prepare you for this new duty. The oath which you took when you entered this chamber as senators was a political, legislative oath. The oath that is now upon you is purely judicial, to do impartial justice.

We are, then, senators, in a court. What are you to try? You are to try the charges contained in these articles of impeachment, and nothing else. Upon what are you to try them? Not upon common fame; not upon the price of gold in New York, or upon any question of finance; not upon newspaper rumor; not upon any views of party policy; you are to try them upon the evidence offered here and nothing else, by the obligation of your oaths.

What is the issue before you? Allow me to say it is not a question whether this or that thing were done. You are not here to try a mere act. By the very terms of the Constitution you can only try in this tribunal crime. Let me repeat the jurisdiction:

Treason, bribery, and other high crimes and misdemeanors.

The jurisdiction is shut within that language, and the issue that this court can try is only the issue of crime or no crime. What is crime? In every grade of it, senators, there must be unlawful purpose and intention. Where these are wanting there cannot be crime. There must be behind the act the unlawful purpose prompting its commission; otherwise there can be no crime.

Let me illustrate. Suppose a crazy man should burst into this chamber and kill one of us. He has committed the act of homicide; he has not committed a crime.

Let me put the case in a different form. Suppose a President should become deranged, and while in that condition should plot treason, attempt to bribe, and break law upon law, would you impeach him? You have no jurisdiction to try him upon impeachment.

Let me put another case not suppositious. President Lincoln claimed and exercised the power of organizing military commissions, under which he arrested and imprisoned citizens within the loyal States. He had no act of Congress warranting it; and the Supreme Court has decided that the act was against the express provisions of the Constitution. Now comes the question, and I beg your attention to it: suppose he did violate the express provisions of the Constitution, according to the gentlemen on the other side he must be convicted. I beg to read from the argument of one of the managers upon that subject. Says the manager who addressed you on the day before yesterday:

Nor can the President prove or plead the motive by which he professes to have been gov-

cused in his violation of the laws of the country. * * * * The necessary, the inevitable presumption in law is, that he acted under the influence of bad motives in so doing, and no evidence can be introduced controlling or coloring in any degree this necessary presumption of the law.

Having, therefore, no right to entertain any motive contrary to his constitutional obligation to execute the laws, he cannot plead his motive. Inasmuch as he can neither plead nor prove his motive, the presumption of the law must remain that in violating his oath of office and the Constitution of the United States he was influenced by a bad motive.

The gentleman seems to acknowledge that there must be a motive. There can be no crime without motive. But when the party comes forward and offers to prove it his answer is, "You shall not prove it." When he comes forward and offers to prove it from his warm, living heart, the answer is, "We will make up your motive out of the presumptions of law, and conclude you upon that subject; we will not hear you." The command is "silence" when you propose to prove the exact motive by which you were prompted in the act.

No, senators; the jurisdiction of this body is to try crime. There is no crime without unlawful intention and purpose. You cannot get it without the unlawful intent or purpose behind the act prompting its commission. Why, what is the judgment that you shall render in this case? Not did the President do this or that act; that is not your inquiry; but was he guilty of a high misdemeanor in the purpose with which he did the act?

With these preliminary observations, I propose to proceed to a brief examination of the merits of the case.

You are now all of you, senators, familiar with the articles of impeachment, and I need not attempt to go over them article by article. I have this to say, and you will all concur with me instantly upon making the statement: the first eight articles are built upon two acts of the President; the one, the removal of Stanton, the other the letter of authority given to Thomas. Now, if you will take up these eight articles, and then the last, the eleventh, and notice the substantial part of them, around which they throw their charges of bad intent and their averments, you will see that in the whole eight articles there are but these two acts, the removal of Stanton and the letter of authority to Thomas, so that we have only to inquire in reference to these two acts in order to ascertain the merits of this case upon these eight articles, and in fact I may say the eleventh also.

If the President of the United States had the right to remove Edwin M. Stanton, then these eight articles are without support. If, in addition to that, he had the right to give that letter of authority to Lorenzo Thomas, the eight articles fall in ruins instantly. There is no senator who has studied this case who will not see the accuracy of this statement at once; and it relieves us from the necessity of going through them, article by article, and step by step. Give me these two propositions, the right to remove Stanton and the right to issue the letter of authority to Thomas, and the articles fall instantly; there is nothing left of them. So that we have at last, in the consideration of these articles, but two inquiries to make:

1. Had the President the right to remove Stanton?
2. Had he the right to issue the letter of authority to Thomas?

I propose, as well as I am able in my condition, to examine these two questions.

Taking up the questions in their order, first, had the President the right to remove Edwin M. Stanton? I propose to examine that question, in the first instance, in connection with the act regulating the tenure of certain civil offices. It is claimed, on the one side, that by the operations of this law Mr. Stanton was withdrawn from his previous position and covered and protected here; it is claimed, upon the other side, that the law does not apply to his case, and if it do not, I think it will be acknowledged by the senators that the President had

Digitized by Google

the right to remove him. Allow me to call your attention, therefore, to one section of this law in which the question is presented:

That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is, and shall be, entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided: *Provided*, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General shall hold their offices respectively for and during the term of the President by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

Now, gentlemen, let me state a few facts before we proceed to the consideration of the construction of this section. The first fact to which I call your attention is that the act was passed on the 2d of March, 1867. I further call your attention to the fact that Stanton's commission is dated on the 15th of January, 1862. It is a commission given to him by President Lincoln, by which he was to hold the office of Secretary for the Department of War "during the pleasure of the President of the United States for the time being." Mr. Johnson became President on the 15th of April, 1865. He has not in any manner commissioned Mr. Stanton. Upon these facts, senators, I claim it is clear that Mr. Stanton is not protected by this bill. Let us inquire. The law proposed to grant to the cabinet officers, as they are called, a term that shall last during the term of the President by whom they were appointed, and one month thereafter. Mr. Johnson has not appointed Mr. Stanton. He was appointed during the first term of Mr. Lincoln. He was not appointed at all during the current presidential term. He holds his office by a commission which would send him through administration after administration until it is recalled. Now, what is the meaning of this language, "he shall hold his office during the term of the President by whom he was appointed?" and he was not appointed during the present term. I think that is enough. It does seem to me that that simple statement settles this question.

The gentleman has said this is Mr. Lincoln's term. The dead have no ownership in office or estate of any kind. Mr. Johnson is the President of the United States with a term, and this is his term. But it would make no difference if Mr. Lincoln were living to-day; if Mr. Lincoln were the President to-day, he could remove Mr. Stanton. Mr. Lincoln would not have appointed him during this term. It was during the last term that Mr. Stanton received his appointment, and not this; and an appointment by a President during one term, by the operation of this law will not extend the appointee through another term because that same party may happen to be re-elected to the Presidency. Stanton, therefore, holds under his commission, and not under the law.

Again, senators, his tenure of office cannot be extended or changed from his commission to the law. What is the proposition of this law? Mr. Stanton held, before its passage, "during the pleasure of the President for the time being." This law proposes to give him, in place of a term at pleasure, a term of years and one month thereafter. By what authority can the Congress of the United States extend the term in this manner? That office can only be held by the appointment of the President. His nomination and his appointment must cover the whole term which the appointee claims. On any other theory the Congress of the United States might extend the offices of persons who had been appointed indefinitely through years and years, and thus defeat the constitutional provision that the President shall nominate and shall appoint for the office, for the whole term of the office. There is no other construction that can be put upon it.

And in this view of it, it appears to me, senators, that the law we have under consideration cannot be made to apply to any offices which were occupied at the time of its passage. Take the case of a general office held at pleasure.

Digitized by Google

What is the character of that tenure? The lowest tenure known to the law is a tenure at pleasure, at sufferance, at will. To convert that into a tenure for a fixed term is to enlarge it, to extend it, to increase it, to make it a larger estate than it was before. If the office be one that cannot be filled without presidential nomination and appointment it does seem to me, whatever may be the office, it cannot be extended as to those who were in office at the time. If this be a right construction of the act of March 2, 1867, and I am compelled to leave it with this brief examination, Mr. Stanton is left where he was before its passage.

It is further to be observed that the act of March 2, 1867, has no repealing clause. We are, therefore, remitted to the previous laws applicable to his case, and this refers us to the Constitution and the act of August 7, 1789. By the provisions of this law it is provided among other things that—

There shall be an executive department to be denominated the Department of War; and there shall be a principal officer therein to be called the Secretary for the Department of War, who shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, and the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order and instruct.

There shall be in the said department an inferior officer, to be appointed by said principal officer, to be employed therein as he shall deem proper. and to be called the chief clerk of the Department of War; and whenever the said principal officer shall be removed from office by the President of the United States, and in any other case of vacancy, shall, during the same, have charge of the records, books, &c.

This is the law to which we are referred, unless the act to regulate the tenure of certain civil offices covers the case of Mr. Stanton. By the terms of this law, by the commission that was issued to Mr. Stanton to hold "during the pleasure of the President of the United States for the time being" framed upon this law, by the uniform construction of it, as I shall show, the President had the right to remove Mr. Stanton according to his pleasure.

Mr. FESSENDEN. Mr. President, the counsel will excuse me. I wish to observe, if I may be permitted to do so, that the counsel is evidently laboring under very severe difficulty in endeavoring to go on, and if he finds himself very much oppressed I feel disposed to move an adjournment unless one of the managers wishes to occupy the day.

Mr. GROESBECK. I am very much obliged to the senator, if he will allow me to answer him. I thank him for the suggestion; but I came here indisposed this morning, and I have apprehensions that I shall not be any better if this matter is postponed. Hence I do not know but that I had better go on as best I can. I shall be very thankful for the attention of the Senate to what I shall say in the condition in which I find myself.

But we are told, senators, by the gentlemen who argue this cause on the other side that there has been no such case as the removal of a head of a department without the co-operation of the Senate, and that the construction which we claim as applicable to this law is unsound. Allow me, upon that subject, to call your attention to pages 357 and 359 of the proceedings. I now refer to the letter of John Adams, written under one of these three laws that were passed in the first Congress under the Constitution. I give you the letter:

PHILADELPHIA, *May* 12, 1800.

SIR: Divers causes and considerations, essential to the administration of the government, in my judgment, requiring a change in the Department of State, you are hereby discharged from any further service as Secretary of State.

JOHN ADAMS,
President of the United States.

That was the act of John Adams, by whose casting vote the bill of 1789 was passed: that act was done according to the construction that was given to the bill; and it is an outright removal during the session of the Senate without the co-operation of the Senate. The letter is addressed to the Secretary of State in his office, declaring him removed; and when Mr. Adams comes to communicate

with the Senate he sends his communication nominating John Marshall, not "in place of Mr. Pickering, to be removed with your assent," but "in place of Mr. Pickering, removed by my will, and according to the law and the language of his commission." Why, senators, there is no doubt about it. If John Adams, who passed this law in the Senate by his casting vote, had had the least idea that the power of removal was not, as it is said to be in the law, in his own hand, do the gentlemen suppose that he would have taken the course he did, and that he would not have taken some such course as this: "Senators, I propose, with your consent, to remove Timothy Pickering and appoint John Marshall in his place." That was not the right construction of the law. His act is the true construction according to his own interpretation and according to the interpretation that has been given from that day to this, down to the passage of the act of March 2, 1867, done in session, done by himself, done without consultation or co-operation with the Senate; and that very form which he adopted when he did remove, as a distinct and independent act, has been followed from that day to this.

Senators, let me call your attention, too, while I am upon this subject, and lest I forget it, to the language of John Marshall in the case of Marbury *vs.* Madison. He was there discussing the question when an appointment was made, when it was complete, so that it was withdrawn from the control of the President; and he held in the decision of that case that it was complete when the commission was made out; but in the course of his decision he goes on to remark:

> When the officer is removable at the will of the Executive the circumstance which completes his appointment is of no concern, because the act is at any time revocable.

So it was always held, and so it has been always understood, "removable by the President;" that is the language; so the commission runs, "removable at the pleasure of the President for the time being." When? In recess? no, at his pleasure; in session? no, at his pleasure, is the language of the commission and the authority given by the commission and by the law. Who will attempt to construe a commission in such language, holding at pleasure, into a commission that he may remove this month or that month or the next month, or in recess or in session? It is, senators, at pleasure; so it has always been understood and construed.

If I am right in the view which I have very briefly taken of the operations of this law, Mr. Stanton was not covered by it, and he is subject to removal under the commission which he received from Mr. Lincoln and under the law of 1789. I beg you to observe that that law is in full force. There is no attempt to repeal it in the act of March 2, 1867. That act in fact has no repealing clause. What then? What become of the first eight articles of this case?

Let us stand at this point and look over the case; it is an excellent point of observation from which to look at it. We have removed one difficulty; we have ascertained one fact: Edwin M. Stanton could be removed by the President. I should like to linger on this question longer. I should like, if I had voice and health to-day, to call your attention to many other points which I had intended to present in this discussion. I should like to read to you the language of your own senators upon this question, especially the pertinent language of the senator who from the conference committee reported this bill for your consideration. I should like to read that language, for it was the last utterance in this chamber before the bill was passed; and it was received with no dissenting voice. It was the true, sound, accepted construction of the law.

But I pass on. We have torn down the main structure of these eight articles. Take out the question of the power to remove Stanton from these eight articles, and they are without support. All you have left to consider is the single question of the right to confer the *ad interim* authority upon Lorenzo Thomas. Senators, we see more than that, if this be so. All these ques-

Digitized by Google

tions of intent—all these questions of force—all these questions of whether we intended to go into court—all these questions that occupied us so much in the course of this investigation, vanish out of sight; for if we had this authority, Edwin M. Stanton was a trespasser; we had the right to remove him, and we were not bound to go to court to ascertain that right.

But, senators, let me ask you still one other question before I proceed. Suppose Mr. Stanton is within the tenure-of-office act, what then? The inquiry then comes for your consideration whether the President is criminal in acting upon the supposition that he was not within it. This inquiry does not challenge the constitutionality of the law. It is a question of construction of a doubtful law. Is there a senator here who will not admit, whatever his view may be upon this subject, that it was a law about which any one might reasonably adopt this construction? I believe that a majority of the senators in this chamber are of the opinion that it does not apply to the case of Mr. Stanton; and even if it did, there is no majority of senators, intelligent senators as you are, who would say that there was not room for doubt in the construction of the law. What then? Let me, in this connection, refer you to the act creating the office of Attorney General. It is to be found on page 93 of 1 Statutes at Large, and reads as follows:

> And there shall also be appointed a meet person, learned in the law, to act as Attorney General for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States.

I need not read any further. Here was a law, the tenure-of-office act, construe it as you will, about which no senator will differ as to the fact that it might be reasonably interpreted as not covering Mr. Stanton by its provisions. And now suppose that the President of the United States did take counsel upon this subject, and did construe the law as Senator Sherman and other senators in this chamber have construed it; I am putting this case now upon the theory that it covered Mr. Stanton; yet a law of doubtful construction as it is, if the President availed himself of the counsels of this officer, who is designated for this special duty, he is harmless by this impeachment, goes acquit of all charge of lawlessness, and cannot be censured for following such counsel.

What is the testimony on that subject? We have a little. It was offered by the managers themselves. You remember, senators, when we were introducing the testimony in this cause, it was offered by the defence to give you the fullest measure of light upon all these questions. The managers shut it out. You consented that the evidence which we proposed to offer, of consultations that were held in the presence of the President by his cabinet, where every word was an act, business consultations, not idle conversations, but consultations for the purpose of deciding upon these grave and important matters; consultations which, if you individually were to undertake to investigate this question of motive and what was done, you could not pass by—when we offered to bring these in and they were excluded, we thought for a time we were without any light on this question. But, senators, I will refer you to some evidence bearing on this very point and to a meeting of the cabinet, as set forth in evidence offered by the managers, where all the members of the cabinet were present, and where it appears that this subject came up for consideration, and it was "taken for granted that as to those members of the cabinet who had been appointed by Mr. Lincoln, their tenure of office was not fixed by the provisions of the act. I do not remember," says the President, "that the point was distinctly stated; but I well recollect that it was suggested by one member of the cabinet who was appointed by Mr. Lincoln and that no dissent was expressed."

The Attorney General was there; the entire cabinet was there; and this subject was considered; this very question of construction came up, and the

opinion was expressed that Mr. Stanton was not included. So that even if the law covered him, yet, by the authority of the statute appointing an Attorney General and requiring him to give advice upon questions of law, the President, acting upon the consultation that occurred in his presence, had the right to do what he did in this instance; and even, as I said, if the law covers Mr. Stanton, it being a question of construction, the respondent is protected.

In this view I desire to repeat that we get rid of a large portion of this cause, and therefore it is that I would like to linger at this point; for it seems to me that it is the most important point in the cause. But I pass on.

Suppose, senators, that the view which I have been presenting is not correct, and that the law does apply to Mr. Stanton, what then? The next inquiry is whether that act be constitutional, or rather, let me say, if it be constitutional, whether the conduct of the President in the removal of Mr. Stanton was criminal. I am aware that very many of you participated as legislators in the passage of that very law, and that you have affirmed its constitutionality. In the unfortunate condition of this case the lawmakers become the judges, and therefore I would not be understood as arguing the point that I now propose to present with a view to change your opinions or to show that the law was unconstitutional. It is not that; but I beg you to observe that my whole object is to present this inquiry to your consideration, whether, in the condition of this question and in the condition of the President, he had the right to take the steps that he did take without incurring the charge of criminality?

And now, passing as I shall, although I had intended to take it up, all discussion of this as an original question; passing by the inquiry what is the right interpretation of the Constitution as to the place where this power of removal is lodged, I proceed to consider the question in the aspect which I have suggested. I start from this point. The question is at least doubtful; and from that point of view I propose to examine it as it stood on the 2d of March, 1867, or at the time the President acted in this case, to ascertain the question of criminality on his part in the act which he did.

Our government is composed of three departments, which, according to the theory of their structure, are to last through all time and under all trials and are to be preserved in their entireness and integrity. The power has been carefully divided and distributed among them with a view to preserve each one in its separateness and independence. They are each independent of the other. No one is responsible to the other. They are responsible to the people or to the States. All this is carefully set down in the Constitution. Those who have charge of these various departments, by the theory and structure of the government, are enjoined each to take care of its own prerogative, if I may use such a word, and to protect itself against all possible encroachment from the others. This they do, each and every department, by observing with the utmost fidelity the provisions of the written Constitution.

At the head of one of these departments, the executive, stands the President of the United States. He is sworn by an oath, the most solemn and obligatory that could be administered, "faithfully to execute the office of President of the United States, and to preserve, protect, and defend the Constitution of the United States." This is not an oath merely to execute the laws. The laws are not named in it. The first part of this oath, "faithfully to execute the office of President," would cover his obligation to execute the law and his obligation to discharge all other executive duties imposed upon him. There would seem to be something more than this; and he is required, in addition to this oath that covers his ordinary executive duties, to swear to the best of his ability to preserve, protect, and defend the Constitution of the United States. That oath is administered to the President alone of all the officers of the government. I do not say, senators, that it has any extraordinary significance; but I do say that there is enough in it for admonition, at least; there is enough in it for

constant caution as a duty of the President in reference to the Constitution. It does seem to me that the terms of such an oath solemnly imposed upon him would impress him with the idea, or any of us with the idea, that it was the first paramount duty that he should ever, in all his executive conduct, keep his eye upon the Constitution of the United States; in all trial that he should look to it; in all doubt that he should lean toward it; in all difficulty that he should take shelter under it.

I heard the eloquent argument of the manager [Mr. Boutwell] who addressed us but two days ago. I heard what he said about the executive department. I should be pleased if I had strength of voice to answer it. The sum and substance of it was that the President of the United States is but the constable of Congress; no more; that he is put into his place merely to execute the laws of Congress. Why, senators, this is not the right interpretation of the Constitution. He is the the Chief Magistrate of this nation, having charge of one of its great departments; and he is faithless to his trust if he do not protect the powers conferred by the Constitution upon that department.

But without delaying upon this question, let me proceed at once to what is more vital to the matter in hand. Shall he disregard law? Never. He should never in mere wantonness disregard any law of Congress that may be passed. Shall he execute all law? Let me answer that question by referring you to the argument of the gentleman whom I have just named. I refer to pages 814, 815, and 817; and I beg leave to say that I take issue with the manager in the propositions which he has taken on this subject, almost entirely. He says:

> If a law be in fact unconstitutional it may be repealed by Congress, or it may, possibly.

Just possibly—

> when a case duly arises, be annulled in its unconstitutional features by the Supreme Court of the United States. The repeal of the law is a legislative act; the declaration by the court that it is unconstitutional is a judicial act; but the power to repeal or to annul or to set aside a law of the United States is in no aspect of the case an executive power. It is made the duty of the Executive to take care that the laws be faithfully Executed—an injunction wholly inconsistent with the theory that it is in the power of the Executive to repeal or annul or dispense with the laws of the land. To the President in the performance of his executive duties all laws are alike. He can enter into no inquiry as to their expediency or constitutionality. All laws are presumed to be constitutional, and, whether in fact constitutional or not, it is the duty of the Executive so to regard them while they have the form of law.

That is the last congressional theory I have heard. Let me read further:

> Hence it follows that the crime of the President is not, either in fact or as set forth in the articles of impeachment, that he has violated a constitutional law, but his crime is that he has violated a law, and in his defence no inquiry can be made whether the law is constitutional.

So that, according to the reasoning of the manager, if now here on this inquiry you should be of the unanimous opinion that the law for the alleged violation of which the President is impeached was unconstitutional, yet you would have to go on and convict him of the commission of a crime in the fact that he did not execute what was not law. I desire to read a little further on this question. Hear the manager:

> The Senate, for the purpose of deciding whether the respondent is innocent or guilty, can enter into no inquiry as to the constitutionality of the act, which it was the President's duty to execute, and which, upon his own answer, and by repeated official confessions and admissions, he intentionally, wilfully, deliberately set aside and violated.

Let me read again:

> With deference I maintain still further that it is not the right of any senator in this trial to be governed by any opinion he may entertain of the constitutionality or expediency of the law in question. For the purposes of this trial the statute which the President, upon his own confession, has repeatedly violated is the law of the land. His crime is that he violated the law.

I wish to read one other passage from this speech, to show the startling doc-

Digitized by Google

trines which the manager has put forth, and upon which it seems the President is to be convicted, according to his theory! Hear this:

> If the President, or Vice-President, or any other civil officer, violates a law, his peril is that he may be impeached by the House of Representatives and convicted by the Senate. This is precisely the responsibility which the respondent has incurred; and it would be no relief to him for his wilful violation of the law, in the circumstances in which he is now placed, if the court itself had pronounced the same to be unconstitutional.

Senators, in answering the question whether the President shall execute all laws, I beg to be understood as differing *in toto cælo* from the gentleman from whose argument I have just read. If a law be declared by the Supreme Court, the third department of this government, and, by the very terms of the Constitution itself, the highest and final interpreter of the constitutionality of congressional enactments, to be unconstitutional, the President is untrue to his position if he execute it in letter or in spirit, or one jot or tittle of it. Let me tell the gentleman, in answer to his long argumentation upon this point, that he makes no distinction between law whatever, that if an act of Congress be unconstitutional it is no law; it never was a law; it never had a particle of validity, although it went through the forms of congressional enactment; from the beginning *ab initio* it was null and void, and to execute it is to violate that higher law, the Constitution of the United States, which delares that to be no law which is in conflict with its provision.

What shall I say, then, in answer to this argument? Shall he execute all law? No. If a law be declared by the Supreme Court unconstitutional he should not execute it. If the law be upon its very face in flat contradiction to plain express provisions of the Constitution, as if a law should forbid the President to grant a pardon in any case, or if a law should declare that he should not be Commander-in-chief, or if a law should declare that he should take no part in the making of a treaty, I say the President, without going to the Supreme Court of the United States, maintaining the integrity of his department, which for the time being is intrusted to him, is bound to execute no such legislation; and he is cowardly and untrue to the responsibilities of his position if he should execute it.

But, senators, the difficulty is not here. The difficulty arises in doubtful cases, in cases where the powers are not plainly and expressly stated in the Constitution; and here it is that we come to the question in inquiry between us in this case. Suppose an act of Congress interpret the Constitution in a doubtful case for the first time, shall the President execute it? I say yes. Suppose an act, instead of giving an interpretation for the first time in a doubtful case, contradicts a long accepted previous interpretation—in this supposition we are approaching the case before us—what is to be done? To follow the Constitution is the first and paramount duty of the President, and to maintain the integrity of his department is also a duty; and if an act of to-day is contrary to a long established interpretation of the Constitution upon a question of power, and a fit case presents itself where he is required to act, it is right and proper in a peaceable way, with a due regard to the public welfare, to test the accuracy of the new interpretation in the forum which is the highest and final interpreter of such questions.

Senators, with this preliminary observation I propose to examine the condition of this question at the time the President performed these acts; but before I do so allow me to call your attention to a few rules of interpretation. They are these:

Acquiescence by the people and the various departments of the government gives force to any interpretation. (15 Maryland Reports, p. 458.)

Let me state another. It may be a grave question whether a first interpretation is right; but long acquiescence in it, if it be a statute, makes another statute necessary to change it; if it be a constitution, it would require an amendment of the constitution to change it. (4 Gill and Johnson, p. 345.)

Digitized by Google

Let me give you another. A long and uniform interpretation becomes a fixed interpretation. When a constitution early undergoes legislative interpretation, and a series of acts are passed according to such interpretation, covering, say, 70 years, even if it were doubtful, such constant, long, and uniform interpretation should remove the doubt. (1 Maryland Reports, p. 351.)

I desire to refer you to one other rule, before I pass to the argument, to be found in 1 Story, section 408:

> And, after all, the *most unexceptional* source of *collateral interpretation* is from the practical exposition of the government itself in its various departments upon particular questions discussed and settled upon their own single merits. These approach the nearest in their own nature to *judicial* expositions, *and have the same general recommendation* that belongs to the latter. They are decided upon solemn argument, *pro re nata*, upon a doubt raised, upon a *lis mota*, upon a deep sense of their importance and difficulty, in the face of the nation, with a view to present action, in the midst of jealous interests, and by men capable of urging or repelling the grounds of argument by their genius, their comprehensive learning, or their deep meditation upon the absorbing topic.

With these preliminary observations, I desire that you will bear with me while I present the question in this form—not the question of the constitutionality of your tenure-of-office act; I will not challenge its constitutionality here in your very faces; you have affirmed it. I beg you to notice, however, that the question which I propose to consider is, what was right and proper for the President, in the condition of this question, and his own condition, at the time he did the act which is set forth in these articles? Observe, before I start upon this inquiry, the law of March 2, 1867, is *constitutional interpretation*. By that law of March 2, 1867, you interpreted the Constitution that the power of removal was lodged in the President and Senate. The previous law, that was passed in 1789, was also, as we know from the frequent utterances of those who participated in its passage, *constitutional interpretation;* and the question before us is, what was the condition of this question at the period of time to which we are calling your attention, when the President acted? Observe the purpose for which I have cited these rules. A long acquiescence by the people and the departments of the government in any interpretation becomes a fixed interpretation; a long and uniform interpretation of the Constitution for a period of 70 years, even if it were a doubtful question, removes the doubt; and it is in the light of those rules of interpretation that I propose to make the inquiry; and I will briefly take it up in all the departments of the government.

How stands the question in the judicial department? I admit, senators, that we have no *res adjudicata* upon this question; the exact question has never been presented to the Supreme Court of the United States; but we have opinions from the Supreme Court, which I proceed now to read.

In 1839, in the case of *ex parte* Hennen, it was declared by the court, Mr. Justice Thompson delivering the opinion:

> No one denied the power of the President and Senate jointly to remove where the tenure of the office was not fixed by the Constitution, which was a full recognition of the principle that the power of removal was incident to the power of appointment: but it was very early adopted as a practical construction of the Constitution that this power was vested in the President alone, and such would appear to have been the legislative construction of the Constitution, for in the organization of the three great Departments of State, War and Treasury, in 1789, provision was made for the appointment of a subordinate officer by the head of the department, who should have charge of the records, books, and papers appertaining to the office when the head of the department should be removed from office by the President of the United States. When the Navy Department was established, in the year 1798, provision was made for the charge and custody of the books, records, and documents of the department in case of vacancy in the office of Secretary by removal or otherwise. It is not here said "by removal of the President," as is done with respect to the heads of the other departments, yet there can be no doubt that he holds his office with the same tenure as the other Secretaries, and is removable by the President. The change of phraseology arose probably from its having become the settled and well-understood construction of the Constitution that the power of removal was vested in the President alone in such cases, although the appointment of the officer is by the President and Senate. (13 Peters, p. 139.)

This is a voice at least, an opinion at least, from the Supreme Court upon this question; not an adjudication, I acknowledge, but an opinion, in reference to which we might have the right to say that it was pronounced with the concurrence of the other members of the bench.

Let me call your attention to another case where we have an utterance from one of the justices of the Supreme Court. I refer to the case of the United States *vs.* Guthrie. (17 Howard, 284.) The case went off upon another point, but in the course of his dissenting opinion Mr. Justice McLean said he thought "the construction" (the one referred to and the one claimed in behalf of the respondent in this case) "wrong, and that the late Supreme Court so thought, with Marshall at its head." He adds, however, and to this I call special attention: "But this power of removal has been, perhaps, too long established and exercised to be now questioned."

It will be observed that Judge McLean refers to Marshall. Let us see what Marshall himself says. I refer you to 2 Marshall's Life of Washington, page 162—the second, or Philadelphia edition, as it is called. I ask senators to observe the language of Marshall upon this occasion, for it is a complete answer to the argument of the manager the day before yesterday in regard to the right interpretation of the debate of 1789. Marshall says:

After an ardent discussion, which consumed several days, the committee divided, and the amendment was negatived by a majority of thirty-four to twenty. The opinion thus expressed by the House of Representatives did not explicitly convey their sense of the Constitution. Indeed, the express grant of the power to the President rather implied a right in the legislature to give or withhold it at their discretion. To obviate any misunderstanding of the principle on which the question had been decided, Mr. Benson moved in the House, when the report of the Committee of the Whole was taken up, to amend the second clause in the bill so as clearly to imply the power of removal to be solely in the President. He gave notice that if he should succeed in this he would move to strike out the words which had been the subject of debate. If those words continued, he said, the power of removal by the President might hereafter appear to be exercised by virtue of a legislative grant only, and consequently be subjected to legislative instability; when he was well satisfied in his own mind that it was by fair construction fixed in the Constitution. The motion was seconded by Mr. Madison, and both amendments were adopted.

Now, let me give you Marshall's own words as to the result of that debate:

As the bill passed into a law it has ever been considered as a full expression of the sense of the legislature on this important part of the American Constitution.

That is Marshall to whom McLean referred in his dissenting opinion; that is his own language. I have no other references to make directly to the Supreme Court or to the judges of that court; but while I am upon the judicial aspect of the question allow me also to refer you to the opinion of Chancellor Kent, to be found in 1 Kent, page 310. There, treating of the act of 1789, he says:

This amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon as of decisive authority in the case. It applies equally to every other officer of the government appointed by the President and Senate whose term of duration is not specially declared. It is supported by the weighty reason that the subordinate officers in the executive department ought to hold at the pleasure of the head of that department, because he is invested generally with the executive authority, and every participation in that authority by the Senate was an exception to a general principle, and ought to be taken strictly. The President is the great responsible officer for the faithful execution of the law, and the power of removal was incidental to that duty, and might often be requisite to fulfil it.

Senators, you observe I call your attention to the condition of this question at the time in the court; I give you two utterances from the bench of the court; I give you the opinion of Marshall; I give you the opinion of Kent upon the point whether, doubtful as the qustion was, it had been interpreted and fixed at the time they gave those utterances. Now, let me refer to the action of the executive department.

From the beginning of the government to March 2, 1867, this has been the uniform construction and practice of every administration. Washington approved the bill, Adams's vote passed it, Jefferson maintained the same posi-

tion, Madison drew the bill, Monroe and Jackson and the Presidents that followed them all maintained the same construction, and every President, including President Lincoln, through all our history of eighty years and twenty administrations, maintained this construction upon the question of where the power of removal is lodged? Observe the judicial department every time its voice has been heard on this question, from the foundation of the government until now, as far as it has expressed itself, has affirmed that the power is lodged by the Constitution in the President. The executive department, from Washington, who put his name to the bill that affirmed it, through Adams, who helped to pass it, and Madison, who drew it, through all the Presidents we have had from the very start of the government under the Constitution down to the present hour, every one has acted upon this construction and affirmed this practice from the beginning until now.

I now take you, gentlemen, into the legislative department of the government. The first Congress assembled under the present Constitution on the 4th day of March, 1789. The Constitution provided, you will remember, for executive departments, and associated them with the President as counsellors and advisers. It became the duty of this Congress to organize them. Very early in the session Mr. Boudinot rose in his place and called the attention of Congress to the fact that the executive departments under the old confederation had come to an end, that it was necessary now to organize new and corresponding ones under the new Constitution; and he suggested in the first instance that before they legislated on the subject they should in debate fix the principles and determine the number of the departments which it was necessary to create. They at once entered upon the subject, and they agreed to establish three departments

If the Senate intends to go into recess, I would be pleased if it would do so now.

Mr. CONKLING. I make the ordinary motion.

Mr. SUMNER. I move that the Senate take a recess for fifteen minutes.

The motion was agreed to; and at the expiration of the allotted time the Chief Justice resumed the chair and called the Senate to order.

Mr. GROESBECK. When the Senate went into recess it will be remembered that I had just begun to present the condition of this question in the legislative department of the government. It was brought to the attention of Congress in the first session that was held under the Constitution. Very early in that session Mr. Boudinot, of New Jersey, rose and presented the question for consideration, and expressed his desire, as I have intimated, that before the bills should be passed the House should settle the principles upon which they should be constructed and the number of departments that should be created. Mr. Madison moved with him in this matter, and I think it was his pen that drew the bills that were afterward vitalized into the laws establishing the Departments of Foreign Affairs, of War, and of the Treasury. I need scarcely state to the senators here present, who must all of them have examined this debate, the principles upon which those bills were constructed and eventually vitalized. I must be allowed, however, in this connection, to refer to the argument of the manager [Mr. Boutwell] on the day before yesterday, in which he undertakes to state the results which were reached in the Congress that passed these laws, and he states them in this language:

> The results reached by the Congress of 1789 are conclusive upon the following points: that that body was of opinion that the power of removal was not in the President absolutely, to be exercised at all times and under all circumstances; and secondly, that during the sessions of the Senate the power of removal was vested in the President and Senate, to be exercised by their concurrent action, while the debate and the votes indicate that the power of the President to remove from office during the vacation of the Senate was, at best, a doubtful power under the Constitution.

I must be allowed also to express my astonishment at this summing up of the results of that debate in 1789. I have read to you the language of John Mar-

shall as to the purpose of that debate. I have read to you the utterances of Justice Thompson from the bench of the Supreme Court as to the results of that debate. I have cited you also to the opinions of Story and of Kent as to the results of that debate. And I here say, with all respect to the honorable manager, that the statement of its results which he presents in his argument is not authorized (allow me to say it with entire respect) by anything that occurred. I say here in the presence of the Senate, all of whom have examined more or less that great debate running through a period of seven or eight days upon the single question where is the power of removal lodged, that the only point which was discussed and finally settled was this: is this power lodged in the President alone, or is it lodged in the President and Senate; and they closed the debate deciding that the power was in the President alone, and changed the phraseology of the bills as they were originally drawn so that all appearance of grant from the legislature might be avoided, and from the face of the bills it would appear that the legislature intended to express themselves as recognizing the power to be by the Constitution directly in the President, and therefore not necessary to be conferred by legislative grant.

I have stated accurately, senators, the substance of that debate. I challenge all contradiction from anything that transpired or from anything that was said.

What passed? They passed the three bills establishing three departments, with these features incorporated into each and all of them. They called them executive departments; they made a principal officer called the Secretary, who was to perform such duties as should "from time to time be enjoined on him or intrusted to him by the President," and should "conduct the business of the department in such manner as the President should from time to time order and instruct." They provided a chief clerk, who, "when the said principal officer should be removed from office by the President," should take charge of the books, papers, &c. This is the general tenor of the bills in reference to those three departments. Such was the action of the first Congress of the United States, a Congress divested of all party animosity, of all party view, I may say comparatively disinterested, at the very opening of the government just starting under the new Constitution. Such was the action of the Congress who intended to fix for all time, as far as they might fix it, the policy upon which this particular power should be regulated in the future; and in the language of Marshall, as he expressed it in the quotation which I read, in order "*to avoid legislative instability*" upon this very question, they took care to so frame the bills as that they should not take the form of grant from the legislature, and so that it might appear as constitutional interpretation only. They passed three laws during that session as I have referred to them. Those laws are in force to this day. They are professedly an interpretation of the Constitution, so declared by the Supreme Court, as I have read to you, not in a *res ad·udicata* utterance, but in an opinion upon an incidental question, so declared and treated by all the Presidents we have had, so declared by that Congress which passed them, and so regarded by every subsequent Congress down to the thirty-ninth.

Senators, I will now pass on nine years, to 1798. They then framed another executive department called the Navy Department; and they recognized the power of removal in that under this phraseology: "In case of vacancy by removal or otherwise," not "by the President;" still more strongly conveying the idea that it was a power lodged by the Constitution in the President, and needing no legislative interference. Upon that theory they framed the fourth department, the Navy Department.

I now step down twenty-seven years, to the creation of the Post Office Department; and in that law they recognized this arrangement in language like this: "provided, that in case of death, resignation or removal from office of the Postmaster General," without saying by whom; but they had all these laws before

them, and others to which I shall refer which had received construction, and in reference to which it was distinctly understood that they were interpretations of the Constitution, acknowledging the power to be lodged in the President, and, therefore, it was not necessary that it should be conferred by express grant.

I pass on to the Interior Department, created in March, 1849. We find in that law language like this:

> Who (the Secretary) shall hold his office by the same tenure and receive the same salary as the Secretaries of the other departments.

Under that language, also, he was removable at pleasure. He held his office by the same tenure as the other Secretaries, and could be removed in the same way.

Let me call your attention to the seventh department, if I may call it that, the Attorney General's Department. That office was established on the 24th day of September, 1789, and in the law establishing it there is not one word said upon the subject of removal or vacancy. The law is as silent as the grave; and yet, under the interpretation given to these laws from the beginning until now, the Attorney General has taken his commission "during the pleasure of the President for the time being," and has been subject to removal by the President, just as any other of the heads of these executive departments.

I have now gone through the legislation establishing the seven executive departments, ranging from 1789 down to 1849, a period of sixty years. But this is not all. I might cite you to numberless other offices, assistants to these, revenue officers, postmasters, and I know not what, established all through this period from Congress to Congress, with different terms; some at pleasure, some for a fixed term unless sooner removed, some indefinitely; and yet all regarded as removable by the President under phraseology like this.

Now, what shall we say of all this legislation? I began with the First Congress that met under the Constitution; I come down with you to the Thirty-Ninth Congress that passed the civil-tenure act; and I point you, by the way, from Congress to Congress, to laws that were passed by these Congresses affirming—every law of this kind being an affirmance—the construction that was started in 1789, that the power of removal was lodged by the Constitution in the President of the United States. I say here by virtue of imperfect examination myself, but of information upon which I rely, that if you were to gather the laws of Congress from 1789 to March, 1867, which expressly affirms this construction, they would average some two or three to every Congress.

Now, how stands the question? What have we? Here is a question of constitutional interpretation. I beg the Senate to observe that these laws which I have read are in force; they are constitutional interpretations. The civil tenure act of 1867 may be in force. That, too, is constitutional interpretation. Now, we come to the question of duty on the part of the President in that condition of legislation. Every department of the government had been, down to March, 1867, of that opinion; all the Presidents, the Supreme Court to the extent I have stated, and every Congress. I probably ought to modify that statement, but there were some seventy or eighty laws upon this subject between 1789 and 1867 affirming the same doctrine by the form in which they acknowledged the power of removal. All this occurred; this was the condition of the question; and now I submit it to you, senators. The law of March, 1867, is constitutional interpretation; all these other laws are constitutional interpretation. May not human reason pause here? May not human judgment doubt? What is the condition of the question? All the Presidents, every revered name that ever filled the office, affirming this doctrine; the Supreme Court uttering itself upon this doctrine; thirty-eight Congresses affirming this doctrine; this on one side, and one Congress on the other. May not human reason pause? May not human judgment doubt? With this great preponderance of testimony and of construction running through a period of nearly

eighty years, was it criminal to stand with this great mass of precedents around him and believe as the thirty-eight Congresses had believed, as all the Presidents had believed, as all that had gone before him had believed; was it criminal, I say, that he, too, believed in that way, and thought that it was a proper case, it being simply a question of constitutional interpretation, to pass to that tribunal which has a right higher than the Executive and higher than Congress upon the subject of interpretation?

Do you believe, senators—this is the question which I desire to propound to you—that Andrew Johnson at the time I have referred to honestly thought that the Constitution lodged this power of removal in the hands of the President? Look back upon what he had before him upon which to form the opinion, and I put again the question to you, do you believe he honestly thought it was so? Your law was before him; these other laws were before him; and what did he propose to do? Just this: to take up your law as it was and go to that tribunal that could inform him finally and effectually how the question stood.

But what, senators, shall be the effect upon the very question, admitting it as an original question to be one of doubt, of this long line of interpretation in every department of the government? I read you the rule that a long and uniform interpretation makes a fixed interpretation. A long and uniform interpretation, say for seventy years, of a doubtful question under the Constitution, would remove the doubt. What rule shall we apply? We are now upon the subject of a power not expressed, and yet we want stability in reference to these powers just as much as if they were expressed. *Stare decisis*, that is the rule; and without it your government has no stability whatever. Can you fix the interpretation of one of these powers by construction? When shall it be accomplished? In five hundred years? I think you would all say that. In four hundred years? I think you would all agree to that. In two hundred years? Yes. In one hundred? Well, it had run on this very question seventy-eight years of the history of the United States; in fact, the whole of its political existence. *Stare decisis*, if we are to have any stability in reference to our Constitution. There is not one-half of it written. *Stare decisis* is the rule that has preserved the English government, that has no written constitution. In this rule it has found firm anchorage through century after century and through revolution after revolution. Are we to have any stability whatever in our institution? *Stare decisis* is the rule we must adopt and adhere to; and on this rule this question stands.

The thirty-ninth Congress alone—very solitary in the midst of all this array—has given its interpretation to the Constitution. Was it any better than that of 1789? Say it was as good; I do not propose to institute any comparison; I do not say that it was not just as dispassionate, just as cool, in just as good a condition as the other; but it was no better than the Congresses which preceded it.

And this brings me now to the question: Is this Senate prepared to drag a President in here and convict him of crime because he believed as every other President believed, as the Supreme Court believed, as thirty-eight of the thirty-nine Congresses believed? That is the question. Senators, that is the state of the question, and in the condition of Andrew Johnson you can find no criminality in what he did. I have put the question to myself, putting myself in his place, with the views which I entertain of the President's duty, not to lie down with his hand on his mouth, and his mouth in the dust before Congress, but to stand up as the Chief Magistrate of a nation whose walls are the shores of a great continent, and maintain the integrity of his department. He shall execute your laws; he shall execute even the doubtful laws; but when you bring to him a question like this, when he has all this precedent behind him and around him, all these voices sounding in his ears, as to what is the right interpretation of the Constitution, and only one the other way, I say you are going too far to

undertake to brand him with criminality because he proposed to go to the Supreme Court and ascertain how it is. To go there is peaceable, is constitutional, is lawful. What is that tribunal there for? For this very purpose.

I did not state the entire case in what I have said. I should have referred you also to the President's care, to the proprieties of his conduct in reference to consulting those who, by long usage, are the advisers and councillors of the President. You shut out many of those inquiries. You would not hear from the defence upon these questions. Suppose this: suppose it to have been brought to your attention, senators, that upon a question of moment like this, a serious question in which you yourselves were interested, the President of the United States disregarded all the usages that had prevailed in the conduct of the administration among other Presidents, turned his back upon his cabinet, held no consultations, but going alone in wilfulness and disregard of those around him, did the act; it would have been a sorry thing for President Johnson if that proof could have been made upon him; and yet the fact that he could prove just the contrary was shut out. Is not that a matter to be considered in determining, not upon the constitutionality of the law, but upon the question of guilt, for that is the question we have before this tribunal?

Now, what was Mr. Johnson's condition? He had a cabinet officer who was unfriendly to him, personally and politically. All the confidential relations between them were broken up. That cabinet officer himself tells you, in a letter to Congress, dated as late as 4th of February—I read from page 235 of the proceedings—that "he has had no correspondence with the President since the 12th of August last;" and he further says that since he resumed the duties of the office he has continued to discharge them "without any personal or written communication with the President;" and he adds:

> No orders have been issued from this department in the name of the President, with my knowledge, and I have received no orders from him.

It thus appears that this cabinet officer was really a new Executive, repudiating the President, having no official communication with him, and proposing to have none; administering the duties of his department without recognizing even the President's name—his enemy. I will not canvass the merits of these officers; but the relation of confidence was gone which you will acknowledge should exist; for it not unfrequently happens, I may venture to say, that you ask for what takes place in those cabinet consultations if the President is willing to remove the seal of secrecy; I think such a request as that has been made within six months from the lower house, if not from the upper; but we know this, that it is a confidential relation, and that when the confidence is gone the relation is destroyed. That was the President's condition. Here was a cabinet officer, in fact, who was a sort of Executive running the office in his own name, not even proposing to communicate with the President. In this condition of things Mr. Johnson found it to be his duty, as he communicated it to General Sherman, to make a change in that department. Let me refer to General Sherman's language on that subject. General Sherman says on page 519, in answer to a question that was put to him:

> I intended to be very precise and very short; but it appeared to me necessary to state what I began to state, that the President told me that the relations between himself and Mr. Stanton, and between Mr. Stanton and the other members of the cabinet, were such that he could not execute the office which he filled as President of the United States without making provision *ad interim* for that office; that he had the right under the law; he claimed to have the right, and his purpose was to have the office administered in the interest of the army and of the country; and he offered me the office in that view. He did not state to me then that his purpose was to bring it to the court directly, but for the purpose of having the office administered properly in the interest of the army and of the whole country.

That was the condition of things. Here was a cabinet officer who refused all intercourse. Observe, senators, I do not intend to go into any inquiry as to right or wrong. I merely state the naked fact. He refused all intercourse.

He carried on the department without communication with the President; a sort of secondary executive. The unity of the cabinet was gone. In that condition of things the President felt it to be his duty as Chief Magistrate to make a change in that department. I see before me here this afternoon more than one man who, if he were in that executive chair, would not tolerate such a condition of things in his cabinet. It is utterly impossible to administer the executive part of the government with division and wrangling and controversy and want of confidence between all the members of it; and in this necessity it was that Mr. Johnson moved to procure a change in that department. That was the case, his own case, a case pressing upon him, not sought; and in executing the duty, as he conceived it to be, to effect that change he came in conflict with this law, and proposed to have its constitutional validity tested.

But, says the gentleman, [Mr. Boutwell,] he did not. I answer that he did. The petition for a writ of *quo warranto* was prepared; and if these proceedings had not been instituted it would have been filed. But how would he have been laughed at, how would he have been ridiculed, if he were now conducting in the Supreme Court proceedings on *quo warranto*, a termination of which could be reached by no possibility for about a year, when at the time this thing was inaugurated it was reported that he was to be impeached and evicted within ten, twenty, or thirty days! The case was brought here. He did prepare, but he had no opportunity to put it to a constitutional test. Mr. Stanton brought a suit against Mr. Lorenzo Thomas. He had him arrested. There was the opportunity. By reason of that he could reach the decision instantly, and how the President snatched at it; and how it was snatched away from him that he might not have the opportunity of testing the constitutionality of the law! So that the President stands fairly on this question.

Talk of force here! Where is the force? Where is even one single bitter personal interview in all this transaction? Not a quarrel of words anywhere. And this is the performance of the Executive who started off to take possession of one of the departments under his charge by force! Well, senators, we have force in the pictures that might easily be drawn of the termination of this transaction. Force is exhibited, if I may so express myself, in that cordial embrace of Thomas and Stanton, when the one stood with his arm around the other, and ran his fingers affectionately through his silver locks. That is the force, the concentration of "force, intimidation, and threats!" And that is about all you can make of it.

We offered to bring in here the cabinet to testify as to what their advice was upon that subject, and you would not hear that. Although it was *res gestæ*, if there were such a thing to be found in any transaction, although they had consulted upon this very question, although their words were deeds, yet you would not hear them; you shut their mouths, and remitted us to the man from Delaware and the empty utterances and boastings of Lorenzo Thomas. What great truth-searchers are these managers in this case! They want us to find force, to find this evil intent in the utterances of this man from Delaware and in the idle conversations at an evening reception, or a midnight masquerade, of a man dressed in a little brief authority; and yet they will not hear the deliberations, the consultations that are held upon this very question, when the transaction is hot in the mind of the party who is about to perform it. There is no rescuing this trial from the manifest imperfection of the testimony on that point.

Now, what was the President's purpose? Why did the President—I put the question to myself while this matter was in progress—appoint—no, it is not an appointment—why did he give this letter of authority to Lorenzo Thomas? He had to do it, senators; there was no other way he could adopt by which he could put the case in condition to test the law. If he had nominated to you, the office would have remained in the exact condition in which it was without a

Digitized by Google

nomination; and therefore it was necessary, by an arrangement of this kind, to get some one who could represent the government on that question; and that was the whole purpose of it. What was his intention in all these movements? Just to get rid of this defiant, unfriendly Secretary. Allow me to use this expression without conveying any personal censure; but that was the relation in which he stood to the President.

What did he do? In the first place he applied to General Grant; and the honorable manager had the assurance to interpret that as a mischievous movement—selecting a man whom the country delights to honor, in whom it has the utmost confidence; ay, in whom the gentleman himself intends to express, ere long, still greater confidence. Selecting such a man as that is to be regarded as a mischievous transaction.

What next? The very next step he took was, not to get a dangerous man, not to get a man in whom you had no confidence. The next man was General Sherman. Who dare charge wickedness or bad purpose upon such movements?

What next? General Sherman would not take it. Did the President run then after somebody that was mischievous, somebody that would excite your apprehensions, and give reason to fear that mischief might come out of the movement? No. The next application was to Major General Thomas. It seems that the President picked out the three men of all others in the nation who should command your favor in regard to the purposes he had in view. No; you cannot make his conduct mischievous. He had one purpose, and that was to change that War Department, and it would have delighted him to make the change and to put there permanently any competent man whom you would select; anything to get rid of the poisoned condition of his cabinet, and that he might have unity and peace restored to it.

But, say the gentlemen, he executed this law in other respects; he changed the forms of his commissions; he reported suspensions under this law. So he did; and, senators, it is one of the strongest facts in this case. He did not take up this law and tear it to pieces. That is lawlessness. He did not trample it under his feet. That is lawlessness. He took it up to have it interpreted in the case that pressed upon him individually, and in all other respects he executed it without the surrender of his own convictions. It was said in the suspension of Mr. Stanton, for instance, that he acted under your law. He did. I can adjust that suspension to the terms of your law; I can adjust it also to his own views; and instead of seizing upon that as a subject of censure, I tell you it was an overture from the President, I know, to get out of this difficulty, and to conciliate you in the hope that you would relieve and let him have a cabinet such as any of you would demand if you were in his place.

Look at that suspension; look at the message of suspension. He tells you, "My cabinet—and Mr. Stanton is the most emphatic of all of them—believe this law is unconstitutional." Mr. Stanton was the one who was selected, as he tells you in the letter, to draw the veto. I wish he had not had a lame arm, and he could have drawn it. It would have been sharper than the one you received. But he tells you in that act of suspension what his views were about the law. He goes on and tells you further, in that very message, "We had this matter up in cabinet meeting; one of the Secretaries appointed by Mr. Lincoln said it did not apply to him, or to any one of those who held over from the previous term, and there was no dissent." All those opinions were in his mind. He communicated them in the very message where you say he surrendered himself utterly to the terms of the tenure-of-civil-office bill. He did all that; and it is to his credit that he has not rushed into heedless and reckless controversy with the law, but has suffered it to be executed until the question of its constitutionality is in some way determined.

Now, gentlemen, I cannot believe—I have been sitting here and listening to the evidence presented in this case for a long time and reading more or less

about it, and I have never been able to come to the conclusion that, when all these matters were laid before the Senate and understood, they could convict the President of criminality for what he has done. There is no force. Where is it? Where is the threat? Where is the intimidation? Nowhere. He did try to get into the courts. That we know. He did his best to get there; ran after a case by which he could have carried it there. Where is his criminality? Is he criminal because he did not surrender the convictions of his mind on the constitutionality of the act of March 2, 1867? So was General Washington criminal; so was Adams criminal. The voices of all these Presidents sustain him; the voices of all the Congresses behind him sustain him; the whole history of the government sustains him in the position which he took. How, then, can you find criminality in his conduct?

But I will hurry on to the second question. Let us go back a moment before I go forward. Return with me for an instant to the end of that brief examination which I made of the right construction of the tenure-of-civil-office act. I told you then that if Stanton were not included the first eight articles of this impeachment substantially fell; and, even if he were included, there could be no criminality if the President acted upon a question of law under the advice of the Attorney General, who was officially designated for the very purpose of giving him that advice. So that from that point of view the great portion of the case falls. I have been examining it, however, in this other aspect. Suppose Stanton were under the law and we had not observed it. I then presented the question, where is the power of removal lodged? Although you have your own opinions, senators, upon the question, differing from that of the President, I see around me gentlemen who argued upon it ably. There is yet the other question which I have presented, and which must be met; and will you, can you, condemn as criminal the President because with such light as he had he thought differently, and acted as I have described?

I come now to the next question, about the *ad interim* appointment; and I beg you to observe that if you shall come to the conclusion that the President had the right to make an *ad interim* appointment, then there is a great shipwreck of this impeachment; it nearly all tumbles into ruin. I beg you again, when you come to examine these articles, to see how many of them are built upon the two facts, the removal of Stanton and the *ad interim* letter given to Thomas. Now, had he the right to make that temporary appointment? He made it under the act of February 13, 1795. Allow me to read it:

> That in case of vacancy in the office of Secretary of State, Secretary of the Treasury, or of the Secretary of the Department of War, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed or such vacancy be filled: *Provided*, That no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months.

You will be pleased to observe that all possible conditions of the departments requiring temporary supply are expressed under the single word "vacancy." It covers removal; it covers the expiration of the term of office; it covers a resignation; it covers absence; it covers sickness; it covers every possible condition of the department in which it may be necessary *ad interim* to supply the service. This law was passed February 13, 1795. There has been another act passed, partly covering the same ground, under the date of February 20, 1863. The question is now, does the act of February 20, 1363, repeal the act of February 13, 1795?

Senators, allow me to call your attention to a few rules of interpretation in reference to statutes before I compare these.

1. The law does not favor repeals by implication. Again, if statutes can be construed together they are to stand. Further, a latter statute, in order to

Digitized by Google

repeal a former one by implication, must fully embrace the whole subject-matter of it. Still again, to effect an entire repeal, all the provisions of the previous statute, the whole subject-matter of it, must be covered.

Let me illustrate. Suppose the reach of a statute extended from myself to yonder door, if I might illustrate it in that way; if a subsequent statute were passed which reached half way, it would repeal as much of the former statute as it overlaid and leave the balance in force. What lies beyond is legislative will, still unrecalled, and is just as binding as the new statute.

Now we come to the comparison of these statutes. The statute of 1795 I have read. The statute of February 20, 1863, (12 Statutes at Large, p. 656,) provides for the case of "death, resignation, absence from the seat of government, or sickness." Death, resignation, absence, and sickness, are the only cases covered by this statute. There are two cases that are not provided for by it, and they are covered by the statute of 1795—removal, expiration of term. We are advised by this simple statement that the reach of the statute of 1795 was beyond that of the statute of February 20, 1863, and so much as lies outside, beyond the latter statute, is still valid legislative will by all fair rules upon the subject of the repeal of statutes.

With these few remarks upon that subject I come to the consideration of the *ad interim* question, and I will endeavor to consider it very briefly. From the foundation of the government, as you have been advised by my colleague [Mr. Curtis] and others, it has been the policy of the government to provide for these *ad interim* necessities. They are not appointments. No commission goes. There is no commission issued under the seal of the United States in such cases. There is a mere letter of authority. Such appointees are not considered as filling the office. I will state a case to illustrate the character of an *ad interim* appointment and the hold it takes upon the office. When Mr. Upsher was killed in 1844 an *ad interim* appointment was made to supply the vacancy occasioned by that accident, and soon afterward the President nominated to the Senate a gentleman to fill the place permanently.

When he made that nomination he nominated Mr. Calhoun in the place of Mr. Upshur, deceased, not even noticing the *ad interim* appointee. That fairly illustrates the condition of an *ad interim* occupant of an office. It has been the policy of the government from the beginning to furnish these supplies to the necessities of the departments for sickness, for absence, for resignation, for any of these causes. An officer at the head of a department dies; the President may wish to appoint some one at a distance; he may wish to inquire before he finally selects the person who is to fill the place. He waits, and in the mean time the department—say the Treasury Department, and others I might name—must be carried on, and the *ad interim* appointee steps in and carries it on. This occurs just as well during the session of the Senate as in the recess. There is not one particle of difference between a session and a recess in the application of this policy. The law makes no difference. Take the law of February 20, 1863; it does not say in the recess you may act, but at any time, according to the necessity, you may act. That is the rule.

Now, senators, I will dismiss this part of the subject by calling your attention to *ad interim* appointments that have been made during the session of heads of departments. In the first place I give you the case of Mr. Nelson, who was appointed *ad interim* Secretary of State during the session of the Senate. I give you the case of General Scott, who was appointed *ad interim* Secretary of War during the session of the Senate. I give you the case of Mr. Moses Kelly, who was appointed *ad interim* Secretary of the Interior Department during the session of the Senate. I give you the case of Mr. Holt, who was appointed during the session of the Senate Secretary of War *ad interim;* but I intend to linger a little at the case of Mr. Holt. I call the attention of the Senate especially to that case, for it is worthy of especial attention and consideration. The

Digitized by Google

case is presented in a message communicated to the Senate by President Buchanan on the 15th of January, 1861, which has been put in evidence and will be found on page 583 of our proceedings. I will read the message:

To the Senate of the United States:

In compliance with the resolution of the Senate, passed on the 10th instant, requesting me to inform that body, if not incompatible with the public interest, "whether John B. Floyd, whose appointment as Secretary of War was confirmed by the Senate on the 6th of March, 1857, still continues to hold said office, and if not, when and how said office became vacant; and further to inform the Senate how and by whom the duties of said office are now discharged; and if an appointment of an acting or provisional Secretary of War has been made, how, when, and by what authority it was so made, and why the fact of said appointment has not been communicated to the Senate," I have to inform the Senate that John B. Floyd, the late Secretary of the War Department, resigned that office on the 29th day of December last, and that on the 1st day of January instant Joseph Holt was authorized by me to perform the duties of the said office until a successor should be appointed or the vacancy filled. Under this authority the duties of the War Department have been performed by Mr. Holt from the day last mentioned to the present time.

I call your attention, senators, to this case especially, for this single reason, and it is important: the Senate itself took the matter under consideration, and inquired of the President what he had done, why he had done it, and by what authority he had done it. In other words, in the case of Holt the Senate went into an actual investigation of the question, and that is the reason why I linger upon it. The Senate asked the President, "Why did you do it, and why did you not report to us?" Full inquiry was made by the Senate in that case into this *ad interim* question, and Mr. Buchanan replied as follows:

The power to carry on the business of the government by means of a provisional appointment when a vacancy occurs is expressly given by the act of February 13, 1795, which enacts "that in case of vacancy in the office of Secretary of State, Secretary of the Treasury, or of the Secretary of the Department of War, or any officer of either of the said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed or such vacancy be filled: *Provided*, That no one vacancy shall be supplied in manner aforesaid for a longer period than six months."

He replies that he did it under the law of 1795, senators will observe. He communicated that fact to the Senate. The Senate received his communication and were satisfied. That is good *res adjudicata* on this question. The Senate took up on that occasion this identical question of *ad interim* appointments during the session, investigated it thoroughly, received Mr. Buchanan's reply that he did it under the very law under which we acted, and the Senate concurred. There was no censure. If the Senate did not censure that act, will they drag President Johnson here as a criminal and brand him with crime for his act? I think not. The cases are identical. You cannot discriminate between them. Both were done under the same law, both done during the session, both exactly alike. The one was not censured. Shall the other be made the ground of criminal condemnation of President Johnson?

I proceed now to glance at the Emory article, and I shall simply glance at it, senators. I do not intend to linger upon such a charge as this. It makes a great noise in the articles; but it is very harmless in the proof. What is the proof to sustain it? The President had an interview with General Emory, and in the course of that interview General Emory informed him of the passage of a certain law by which he as commander-in-chief was divested of the authority to issue commands directly, but they must pass through the general-in-chief. They had a conversation upon the subject, and the President remarked in the course of that conversation that the law was unconstitutional. He had said it to you; he did not say anything more to Emory; and that is the enormous crime he committed under article nine. He said the law was unconstitutional. What of that? It is in evidence before you, and uncontradicted. Secretary

Welles tells you that the President had been informed that there were unusual movements of troops going on in the city the night before, and Secretary Welles called upon the President to advise him of that fact, and the President said he would inquire about it. He did. He sent a note to General Emory; General Emory waited upon him and gave him the information. That is all. Is it not explained why he sent for General Emory; does anybody contradict it? No. The time, the occasion, everything in the transaction adjusts itself to that explanation and to no other. Here was a President whom you had subordinated to an inferior officer—I mean to the extent of requiring him to pass his orders through an inferior officer—who having heard these rumors of military movements going on, and being called upon by one of his cabinet officers to look into it, responded, "I will inquire;" and he did. That is all there is of article nine. I will not delay upon it any longer.

I now come to article ten. I shall leave the labored discussion of this article to my colleague [Mr. Evarts] who is to come after me. But I wish to say just a few words about it. I refer you in reply to this whole article to the constitutional provision bearing upon this subject, denying to Congress the right to abridge the freedom of speech. Are there any limitations to this privilege? Does it belong only to the private citizen? Is it denied to officers of the government? May not the Executive freely canvass the measures of any other department? May Congress set itself up as the standard of good taste? Has it authority to prescribe the rules of presidential decorum? Will it not be quite enough if Congress will preserve its own dignity? Shall it dictate the forms of expression in which it may be referred to? Can you punish in the forum of impeachment what Congress cannot forbid in the form of law? These are pertinent questions bearing upon article ten. But I do not propose to discuss it. I wish to present to you, senators, a little history which article ten very forcibly suggests to my mind.

In 1798 some good people in the country seem to have been operated upon very much as the managers, or rather the House of Representatives, were in this instance, and they took it into their heads to get up what is called a sedition law, which is very like article ten. I propose to read it. The act of July 14, 1798, provided:

That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering, or publishing any false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute, or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the Constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding $2,000, and by imprisonment not exceeding two years.

I need not explain, senators, the purpose of this act. It expired by its own limitation. It was the most offensive law that has ever been passed since the government was organized. So offensive was it that the people would not rest under it, although it was passed to last but three years. They started, as it were, the hue and cry against everybody who defended it or was concerned in it, and hunted them to a political death. But it was a good law compared with article ten. The sedition law of 1798 condemned what? It condemned the act of coolly and under no provocation or excitement preparing and publishing a libel against the government or any department thereof; but so clamorous and indignant were the people over such legislation that they broke it down;

and the consequence has been, so unpopular was it, that Congress has not ventured to pass a law upon the subject of libel against the government or any department from that day to this. It has been reserved for the House of Representatives, through its managers, to renew the practice in a more objectionable form. And I take it upon myself to suggest that before we are to be condemned in a court of impeachment we shall have some law upon the subject; and I have ventured to draw up, and I shall close my examination of this particular question by presenting to you the draught of a bill which I have made on article ten of this impeachment. It should have a preamble, of course. I will proceed to read it:

Whereas it is highly improper for the President of the United States or any other officer of the executive department or of any department to say anything tending to bring ridicule or contempt upon the Congress of the United States, or to impair the regard of the good people of the United States for the Congress and the legislative power thereof, (which all officers of the government ought inviolably to preserve and maintain;) and whereas (quoting in part from an argument of the managers) the dignity of station, the proprieties of position, the courtesies of office, all of which are a part of the common law of the land, require the President of the United States to observe that gravity of deportment, that fitness of conduct, that appropriateness of demeanor, and those amenities of behavior which are a part of his high official functions; and whereas he stands before the youth of the country as the exemplar of all that is of worth in ambition, or that is to be sought in aspiration, and before the men of the country as a grave magistrate, and before the world as the representative of free institutions; and whereas it is the duty of Congress, and especially of the House of Representatives, as the fountain of national dignity, to lay down rules of decorum, and to regulate the manners and etiquette proper for this and every other high officer of the government: Therefore,

Be it enacted, &c., That if the President or any other officer shall say anything displeasing to Congress, or either branch thereof, or shall in any addresses, extemporaneous or written, which he may be required to make in response to calls from the people, say anything tending to impair the regard of the people for Congress, or either branch thereof, or if he shall use any unintelligible phrases, such as that "Congress is a body hanging, as it were, on the verge of the government," or say that it is "a Congress of only a part of the States," because ten States are not represented therein; or if he shall charge it in such addresses with encroaching upon constitutional rights, however he may think; or if he shall misquote or carelessly quote the sacred Scriptures, or in any of said extemporaneous addresses use bad grammar, then, and in either of such cases, he shall be guilty of a high misdemeanor, and upon trial and conviction thereof shall be fined in any sum not exceeding $10,000, or imprisoned not exceeding ten years. [Laughter.]

That is article ten. [Laughter.]

The next and last is article eleven. Senators, I have discussed article eleven already with the exception of one single feature, and that is the part of it which charges obstruction or interference with the law for the reconstruction of the rebel States. That is the only feature in article eleven I have not fully answered in the remarks I have made in connection with other articles. Now, what shall I say of that? I am glad, senators, that I have nothing to say upon the subject. What testimony has the prosecution offered in support of that charge? They offer this single item of testimony, and no other: a telegram from Parsons, and a reply from the President, dated in the January preceding the March when the law was passed. Need I pause upon such proof of the violation or obstruction of a thing not *in esse* when the act was done?

We heard a magnificent oration from one of the honorable managers two days ago; but the defect of it was, it had nothing to support it. He made his magnificent oration, sounding with sonorous sentences through this hall, for about three hours, on that telegram of January 15, 1867, which was sent two months before the law was passed. That is all the proof. If we intend to judge this case upon proof here presented, that is all the proof he had for a large portion of his speech.

Now, senators, I have gone over this case as far as I intend to do in my condition, though not so far as I proposed to do when I prepared my brief. But I know I am to be followed by a gentleman who will go over it step by step, article by article, in all probability, and therefore I feel the more safe in omitting a part of what I have prepared to say and what under other circumstances I

Digitized by Google

should have been glad to say. I stand now beyond article 11, beyond all the articles, and I ask you to look back with me upon the case. What questions are involved in it? I am happy to be able to say that there is no political question; that there is no party question. I was glad, the defence was glad, the counsel were glad of the opportunity of relieving you from the embarrassment of any such questions. The questions presented are these:

1. Where is the power of removal lodged by the Constitution?
2. Is Stanton covered by the civil-tenure act?
3. Could the President make an *ad interim* appointment?
4. Did he do anything mischievous in his interview with General Emory?

And then there is this matter of the liberty of speech, which, I apprehend, nobody intends to take on his back and carry as a heavy load for the rest of his life, so that we have no political questions here. I am glad it is so. They are dry questions of practice and of law; one of them the oldest question in the history of the government. And on this statement of the case, when you strip it of all the verbiage and rumor and talk of every kind, standing almost naked upon a few technical propositions, upon such a case we ask your judgment of acquittal. We are entitled to it beyond all peradventure. It almost shocks me to think that the President of the United States is to be dragged out of his office on these miserable little questions, whether he could make an *ad interim* appointment for a single day, or whether in anything he did there was so great a crime that you should break the even flow of the administration of the country, disturb the quiet of the people, and impair their confidence in a great degree in the stability of their government; that you should, in a word, take possession of the Executive, and, what is worse and most unfortunate in the condition of things, empty the office *and fill it with one of your own number.* Not on this case. Surely not on this case, senators. I cannot understand how such a thing can possibly be done. How miserable is this case! An *ad interim* appointment for a single day, an attempt to remove Edwin M. Stanton, who stood defiantly, and, right or wrong, had destroyed the harmony and unity of the cabinet. I do not speak in censure of Mr. Stanton—such is the fact. That is all!

Senators, we have been referred to a great many precedents. I heard one of the honorable managers talk two days ago about Charles I, and we have had abundance of precedents submitted on the subject of expediency and things like that; policy, if you please, as if this were a measure and not a trial. We have nothing to do with measures in the high court of impeachment. You are trying the defendant on the charges set forth in these articles and upon the proof offered from the witness-stand, and upon nothing else. I, too, can point to those precedents to which the gentlemen have called your attention—the miserable precedents which they have brought up on the subject of impeachment, even from centuries back; and they are to me, as they should be to all of us, not examples for imitation, but "beacon-lights to warn us from the dangerous rocks on which they are kindled." Let us shun all unnecessary violence. As we sow, so shall we reap: like begets like: violence, violence, and the practice of to-day shall be the precedent for to-morrow.

What shall be your judgment? What is to be your judgment, senators, in this case? Removal from office and perpetual disqualification? If the President has committed that for which he should be ejected from office, it were judicial mockery to stop short of the largest disqualification you can impose. It will be a heavy judgment. What is his crime, in its moral aspects, to merit such a judgment? Let us look at it.

He tried to pluck a thorn out of his very heart, for the condition of things in the War Department, and consequently in his cabinet, did pain him as a thorn in his heart. You fastened it there, and you are now asked to punish him for attempting to extract it. What more? He made an *ad interim* appointment

to last for a single day. You could have terminated it whenever you saw fit. You had only to take up the nomination which he sent to you, which was a good nomination, and act upon it, and the *ad interim* appointment vanished like smoke. He had no idea of fastening it upon the department. He had no intention to do anything of that kind. He merely proposed that for the purpose, if the opportunity should occur, of subjecting this law to a constitutional test. That is all the purpose it was to answer. It is all for which it was intended. The thing was in your hand from the beginning to the end. You had only to act upon the nomination, and the matter was settled. Surely that is no crime.

I point you to the cases that have occurred of *ad interim* appointment after *ad interim* appointment; but I point especially to the case of Mr. Holt, where the Senate in its legislative capacity examined it, weighed it, decided upon it, heard the report of the President, and received it as satisfactory. That is, for the purposes of this trial, before the same tribunal *res adjudicata*, I think, and it will be so regarded.

What else did he do? He talked with an officer about the law. That is the Emory article. He made intemperate speeches, though full of honest, patriotic sentiments; when reviled he should not revile again; when smitten upon one cheek he should turn the other.

But, says the gentleman who spoke last on behalf of the managers, he tried to defeat pacification and restoration. I deny it in the sense in which he presented it—that is, as a criminal act. Here, too, he followed precedent and trod the path on which were the footprints of Lincoln, and which was bright with the radiance of his divine utterance, "Charity for all, malice toward none." He was eager for pacification. He thought that the war was ended. It seemed so. The drums were all silent; the arsenals were all shut; the roar of the cannon had died away to the last reverberations; the army was disbanded; not a single enemy confronted us in the field. Ah, he was too eager, too forgiving, too kind. The hand of conciliation was stretched out to him and he took it. It may be he should have put it away, but was it a crime to take it? Kindness, forgiveness a crime? Kindness a crime? Kindness is omnipotent for good, more powerful than gunpowder or cannon. Kindness is statesmanship. Kindness is the high statesmanship of heaven itself. The thunders of Sinai do but terrify and distract; alone they accomplish little; it is the kindness of Calvary that subdues and pacifies.

What shall I say of this man? He is no theorist; he is no reformer. I have looked over his life. He has ever walked in beaten paths, and by the light of the Constitution. The mariner, tempest-tossed in mid-sea, does not more certainly turn to his star for guidance than does this man in trial and difficulty to the star of the Constitution. He loves the Constitution. It has been the study of his life. He is not learned and scholarly, like many of you; he is not a man of many ideas, or of much speculation; but by a law of the mind he is only the truer to that he does know. He is a patriot, second to no one of you in the measure of his patriotism. He loves his country. He may be full of error; I will not canvass now his views; but he loves his country. He has the courage to defend it, and I believe to die for it if need be. His courage and his patriotism are not without illustration.

My colleague [Mr. Nelson] referred the other day to the scenes which occurred in this chamber when he alone of twenty-two senators remained; even his State seceded, but he remained. That was a trial of his patriotism, of which many of you, by reason of your locality and your life-long association, know nothing. How his voice rang out in this hall in the hour of alarm for the good cause, and in denunciation of the rebellion. But he did not remain here; it was a pleasant, honorable, safe, and easy position; but he was wanted for a more difficult and arduous and perilous service. He faltered not, but entered upon it. That was a trial of his courage and patriotism of which some of you who now sit in judg-

Digitized by Google

ment on more than his life know nothing. I have often thought that those who dwelt at the north, safely distant from the collisions and strife of the war, knew but little of its actual, trying dangers. We who lived on the border know more. Our horizon was always red with its flame; and it sometimes burned so near us that we could feel its heat upon the outstretched hand. But he was wanted for greater peril, and went into the very furnace of the war, and there served his country long and well. Who of you have done more? Not one. There is one here whose services cannot be over-estimated, as I well know, and I withdraw all comparison.

But it is enough to say that his services were great and needed; and it seems hard, it seems cruel, senators, that he should be dragged here as a criminal, or that any one who served his country and bore himself well and bravely through that trying ordeal should be condemned upon miserable technicalities.

If he has committed any gross crime, shocking alike and indiscriminately the entire public mind, then condemn him; but he has rendered service to the country that entitles him to kind and respectful consideration. He has precedents for everything he has done, and what excellent precedents! The voices of the great dead come to us from the grave sanctioning his course. All our past history approves it. How can you single out this man, in this condition of things, and brand him before the world, put your brand of infamy upon him because he made an *ad interim* appointment for a day, and possibly may have made a mistake in attempting to remove Stanton? I can at a glance put my eye upon senators here who would not endure the position which he occupied. You do not think it is right yourselves. You framed this civil-tenure law to give each President his own cabinet, and yet his whole crime is that he wants harmony and peace in his.

Senators, I will not go on. There is a great deal that is crowding on my tongue for utterance, but it is not from my head; it is rather from my heart; and it would be but a repetition of the vain things I have been saying the past half hour. But I do hope you will not drive the President out and take possession of his office. I hope this not merely as counsel for Andrew Johnson; for Andrew Johnson's administration is to me but as a moment, and himself as nothing in comparison with the possible consequences of such an act. No good can come of it, senators, and how much will the heart of the nation be refreshed if at last the Senate of the United States can, in its judgment upon this case, maintain its ancient dignity and high character in the midst of storm and passion and strife.

Mr. GRIMES. Mr. Chief Justice, I move that the Senate, sitting as a court of impeachment, adjourn.

The motion was agreed to; and the Senate, sitting for the trial of the impeachment, adjourned.

MONDAY, *April* 27, 1868.

The Chief Justice of the United States took the chair.

The usual proclamation having been made by the Sergeant-at-arms,

The managers of the impeachment on the part of the House of Representatives and the counsel for the respondent, except Mr. Stanbery, appeared and took the seats assigned to them respectively.

The members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

The journal of last Saturday's proceedings of the Senate sitting for the trial of the impeachment was read.

Digitized by Google

The CHIEF JUSTICE. The first business in order is the consideration of the order submitted by the senator from Vermont, [Mr. Edmunds.] The Secretary will read the order.

The chief clerk read as follows:

Ordered, That after the arguments shall be concluded, and when the doors shall be closed for deliberation upon the final question, the official reporters of the Senate shall take down the debates upon the final question, to be reported in the proceedings.

Mr. WILLIAMS. Mr. President, I propose an amendment to the resolution, which I send to the Chair.

The Chief Justice read the amendment, which was to add to the proposed order the following words:

But no senator shall speak more than once, nor to exceed fifteen minutes, during such deliberation.

Mr. JOHNSON. Mr. Chief Justice, I ask for the reading of the rule in relation to the time senators are permitted to speak. I think it is fifteen minutes upon each article.

The CHIEF JUSTICE. The Secretary will read the rule.

The chief clerk read rule XXIII, as follows:

XXIII. All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, except when the doors shall be closed for deliberation, and in that case no member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the members present.

Mr. JOHNSON. That is upon each article, as I supposed.

Mr. EDMUNDS. No, sir; it is not.

The CHIEF JUSTICE. The question is on the amendment proposed by the senator from Oregon, [Mr. Williams.]

Mr. HOWARD. I move to amend the amendment by adding after the words "fifteen minutes" the words "on one question."

The CHIEF JUSTICE. The question is on the amendment proposed by the senator from Michigan to the amendment of the senator from Oregon.

Mr. SUMNER called for the yeas and nays, and they were ordered; and being taken, resulted—yeas, 19; nays, 30; as follows:

YEAS—Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Frelinghuysen, Grimes, Hendricks, Howard, Johnson, McCreery, Norton, Patterson of Tennessee, Saulsbury, Trumbull, Vickers, and Willey—19.

NAYS—Messrs. Cameron, Cattell, Chandler, Conkling, Corbett, Cragin, Drake, Edmunds, Ferry, Harlan, Henderson, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sherman, Stewart, Sumner, Thayer, Tipton, Van Winkle, Williams, Wilson, and Yates—30.

NOT VOTING—Messrs. Anthony, Cole, Conness, Sprague, and Wade—5.

So the amendment to the amendment was rejected.

The CHIEF JUSTICE. The question recurs on the amendment offered by the senator from Oregon.

Mr. BAYARD. I move to amend the amendment by striking out "fifteen" and inserting "thirty;" and on that I ask for the yeas and nays.

The yeas and nays were ordered; and being taken, resulted—yeas, 16; nays, 34; as follows:

YEAS—Messrs. Bayard, Buckalew, Corbett, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Saulsbury, and Vickers—16.

NAYS—Messrs. Anthony, Cameron, Cattell, Chandler, Conkling, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Henderson, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sherman, Stewart, Sumner, Thayer, Tipton, Trumbull, Van Winkle, Willey, Williams, Wilson, and Yates—34.

NOT VOTING—Messrs. Cole, Conness, Sprague, and Wade—4.

Digitized by Google

So the amendment to the amendment was rejected.

The CHIEF JUSTICE. The question recurs on the amendment of the senator from Oregon.

Mr. MORTON. I move the postponement of the further consideration of this subject until after the argument is concluded by the counsel and the managers.

Mr. HOWARD. I second that motion.

The motion to postpone was agreed to.

The CHIEF JUSTICE. The next business in order is the consideration of the proposed new rules submitted by the senator from Massachusetts, [Mr. Sumner.] The first one of them will be read.

Mr. SUMNER. Mr. President, I ask that those propositions, which were moved by me on Saturday, may go over until after the close of the argument.

The CHIEF JUSTICE. If there be no objection the proposition of the senator from Massachusetts will be considered as agreed to, and the proposed rules will go over. Gentlemen Managers on the part of the House of Representatives, you will please proceed with the argument.

Hon. THADDEUS STEVENS, one of the managers on behalf of the House of Representatives, addressed the Senate as follows:

Mr. Chief Justice, may it please the court, I trust to be able to be brief in my remarks, unless I should find myself less master of the subject which I propose to discuss than I hope. Experience has taught that nothing is so prolix as ignorance. I fear I may prove thus ignorant, as I had not expected to take part in this debate until very lately.

I shall discuss but a single article—the one that was finally adopted upon my earnest solicitation, and which, if proved, I considered then, and still consider, as quite sufficient for the ample conviction of the distinguished respondent and for his removal from office, which is the only legitimate object for which this impeachment could be instituted.

During the very brief period which I shall occupy I desire to discuss the charges against the respondent in no mean spirit of malignity or vituperation, but to argue them in a manner worthy of the high tribunal before which I appear, and of the exalted position of the accused. Whatever may be thought of his character or condition, he has been made respectable and his condition has been dignified by the action of his fellow-citizens. Railing accusation, therefore, would ill become this occasion, this tribunal, or a proper sense of the position of those who discuss this question on the one side or the other.

To see the chief servant of a trusting community arraigned before the bar of public justice, charged with high delinquencies, is interesting. To behold the Chief Executive Magistrate of a powerful people charged with the betrayal of his trust, and arraigned for high crimes and misdemeanors, is always a most interesting spectacle. When the charges against such public servant accuse him of an attempt to betray the high trust confided to him and usurp the power of a whole people, that he may become their ruler, it is intensely interesting to millions of men, and should be discussed with a calm determination, which nothing can divert and nothing can reduce to mockery. Such is the condition of this great republic, as looked upon by an astonished and wondering world.

The offices of impeachment in England and America are very different from each other in the uses made of them for the punishment of offences; and he will greatly err who undertakes to make out an analogy between them, either in the mode of trial or the final result.

In England the highest crimes may be tried before the high court of impeachment, and the severest punishments, even to imprisonment, fine, and death, may be inflicted.

When our Constitution was framed all these personal punishments were excluded from the judgment, and the defendant was to be dealt with just so far as the public safety required, and no further. Hence it was made to apply simply

to political offences—to persons holding political positions, either by appointment or election by the people.

Thus it is apparent that no crime containing malignant or indictable offences higher than misdemeanors was necessary either to be alleged or proved. If the respondent was shown to be abusing his official trust to the injury of the people for whom he was discharging public duties, and persevered in such abuse to the injury of his constituents, the true mode of dealing with him was to impeach him for crimes or misdemeanors, (and only the latter is necessary,) and thus remove him from the office which he was abusing. Nor does it make a particle of difference whether such abuse arose from malignity, from unwarranted negligence, or from depravity, so repeated as to make his continuance in office injurious to the people and dangerous to the public welfare.

The punishment which the law, under our Constitution, authorizes to be inflicted fully demonstrates this argument: that punishment upon conviction extends only to removal from office, and if the crime or misdemeanor charged be one of a deep and wicked dye the culprit is allowed to run at large, unless he should be pursued by a new prosecution in the ordinary courts. What does it matter, then, what the motive of the respondent might be in his repeated acts of malfeasance in office? Mere mistake in intention, if so persevered in after proper warning as to bring mischief upon the community, is quite sufficient to warrant the removal of the officer from the place where he is working mischief by his continuance in power.

The only question to be considered is: is the respondent violating the law? His perseverance in such a violation, although it shows a perverseness, is not absolutely necessary to his conviction. The great object is the removal from office and the arrest of the public injuries which he is inflicting upon those with whose interests he is intrusted.

The single charge which I had the honor to suggest I am expected to maintain. That duty is a light one, easily performed, and which, I apprehend, it will be found impossible for the respondent to answer or evade.

When Andrew Johnson took upon himself the duties of his high office he swore to obey the Constitution and take care that the laws be faithfully executed. That, indeed, is and has always been the chief duty of the President of the United States. The duties of legislation and adjudicating the laws of his country fall in no way to his lot. To obey the commands of the sovereign power of the nation, and to see that others should obey them, was his whole duty—a duty which he could not escape, and any attempt to do so would be in direct violation of his official oath; in other words, a *misprision of perjury*.

I accuse him, in the name of the House of Representatives, of having perpetrated that foul offence against the laws and interests of his country.

On the 2d day of March, 1867, Congress passed a law, over the veto of the President, entitled "An act to regulate the tenure of certain civil offices," the first section of which is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who may hereafter be appointed to any such office and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided: *Provided*, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

The second section provides that when the Senate is not in session, if the President shall deem the officer guilty of acts which require his removal or suspension, he may be suspended until the next meeting of the Senate; and that within twenty days after the meeting of the Senate the reasons for such sus-

Digitized by Google

pension shall be reported to that body; and, if the Senate shall deem such reasons sufficient for such suspension or removal, the officer shall be considered removed from his office; but if the Senate shall not deem the reasons sufficient for such suspension or removal, the officer shall forthwith resume the functions of his office, and the person appointed in his place shall cease to discharge such duties.

On the 12th day of August, 1867, the Senate then not being in session, the President suspended Edwin M. Stanton, Secretary of the Department of War, and appointed U. S. Grant, General, Secretary of War *ad interim*. On the 12th day of December, 1867, the Senate being then in session, he reported, according to the requirements of the act, the causes of such suspension to the Senate, which duly took the same into consideration. Before the Senate had concluded its examination of the question of the sufficiency of such reasons he attempted to enter into arrangements by which he might obstruct the due execution of the law, and thus prevent Edwin M. Stanton from forthwith resuming the functions of his office as Secretary of War, according to the provisions of the act, even if the Senate should decide in his favor.

And in furtherance of said attempt, on the 21st day of February, 1868, he appointed one Lorenzo Thomas, by letter of authority or commission, Secretary of War *ad interim*, without the advice and consent of the Senate, although the same was then in session, and ordered him (the said Thomas) to take possession of the Department of War and the public property appertaining thereto, and to discharge the duties thereof.

We charge that, in defiance of frequent warnings, he has since repeatedly attempted to carry those orders into execution, and to prevent Edwin M. Stanton from executing the laws appertaining to the Department of War and from discharging the duties of the office.

The very able gentleman who argued this case for the respondent has contended that Mr. Stanton's case is not within the provisions of the act regulating the tenure of certain civil offices, and that therefore the President cannot be convicted of violating that act. His argument in demonstrating that position was not, I think, quite equal to his sagacity in discovering where the great strength of the prosecution was lodged. He contended that the proviso which embraced the Secretary of War did not include Mr. Stanton, because he was not appointed by the President in whose term the acts charged as misdemeanors were perpetrated; and in order to show that, he contended that the *term* of office mentioned during which he was entitled to hold meant the time during which the President who appointed him actually did hold, whether dead or alive; that Mr. Lincoln, who appointed Mr. Stanton, and under whose commission he was holding indefinitely, being dead, his *term* of office referred to had expired, and that Mr. Johnson was not holding during a part of that *term*. That depends upon the Constitution and the laws made under it. By the Constitution, the whole time from the adoption of the government was intended to be divided into equal presidential periods, and the word "*term*" was technically used to designate the time of each. The first section of the second article of the Constitution provides—

> That the executive power shall be vested in a President of the United States of America. He shall hold his office during the *term* of four years, and together with the Vice-President, chosen for the same *term*, be elected as follows, &c.

Then it provides that—

> In cases of removal from office, or of his death, resignation, or inability to discharge the duties of said office, the same shall devolve on the Vice-President, and Congress may by law provide for the case of removal, death, resignation, or inability both of the President and Vice-President, designating what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

The learned counsel contends that the Vice-President, who accidentally

Digitized by Google

accedes to the duties of President, is serving out a new presidential term of his own, and that, unless Mr. Stanton was appointed by him, he is not within the provisions of the act. It happened that Mr. Stanton was appointed by Mr. Lincoln in 1862 for an indefinite period of time, and was still serving as *his* appointee, by and with the advice and consent of the Senate. Mr. Johnson never appointed him, and, unless he held a valid commission by virtue of Mr. Lincoln's appointment, he was acting for three years, during which time he expended billions of money and raised hundreds of thousands of men, without any commission at all. To permit this to be done without any valid commission would have been a misdemeanor in itself. But if he held a valid commission, whose commission was it? Not Andrew Johnson's. Then in whose term was he serving, for he must have been in somebody's term? Even if it was in Johnson's term, he would hold for four years unless sooner removed, for there is no term spoken of in the Constitution of a shorter period for a presidential term than four years. But it makes no difference in the operation of the law whether he was holding in Lincoln's or Johnson's term. Was it not in Mr. Lincoln's term? Lincoln had been elected and re-elected, the second term to commence in 1865, and the Constitution expressly declared that that term should be four years.

By virtue of his previous commission and the uniform custom of the country, Mr. Stanton continued to hold during the term of Mr. Lincoln, unless sooner removed. Now, does any one pretend that from the 4th of March, 1865, a new presidential term did not commence? For it will be seen upon close examination that the word "*term*" alone marks the time of the presidential existence, so that it may divide the different periods of office by a well recognized rule. Instead of saying that the Vice-President shall become President upon his death the Constitution says:

> In the case of the removal of the President from office, or of his death, resignation, or inability to discharge the *powers and duties* of the said office, the same shall devolve on the Vice-President.

What is to devolve on the Vice-President? Not the presidential commission held by his predecessor, but the "duties" which were incumbent on him. If he were to take Mr. Lincoln's term he would serve for four years, for term is the only limitation to that office, defined in the Constitution, as I have said before. But the learned counsel has contended that the word "*term*" of the presidential office means the death of the President. Then it would have been better expressed by saying that the President shall hold his office during the *term* between two assassinations, and then the assassination of the President would mark the period of the operations of this law.

If, then, Mr. Johnson was serving out one of Mr. Lincoln's terms, there seems to be no argument against including Mr. Stanton within the meaning of the law. He was so included by the President in his notice of removal, in his reasons therefor given to the Senate, and in his notification to the Secretary of the Treasury; and it is too late, when he is caught violating the very law under which he professes to act, to turn round and deny that that law affects the case. The gentleman treats lightly the question of estoppel; and yet really nothing is more powerful, for it is an argument by the party himself against himself, and although not pleadable in the same way is just as potential in a case *in pais* as when pleaded in a case of *record*.

But there is a still more conclusive answer. The first section provides that *every* person holding civil office who has been appointed with the advice and consent of the Senate, and every person that hereafter shall be appointed to any such office, shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided. Then comes the proviso which the defendant's counsel say does not embrace Mr. Stanton, because he was not appointed by the President in whose

term he was removed. If he was not embraced in the proviso, then he was nowhere specially provided for, and was consequently embraced in the first clause of the first section, which declares that every person holding any civil office not otherwise provided for comes within the provisions of this act.

The respondent, in violation of this law, appointed General Thomas to office, whereby, according to the express terms of the act, he was guilty of a high misdemeanor. But whatever may have been his views with regard to the tenure-of-office act, he knew it was a law, and so recorded upon the statutes. I disclaim all necessity in a trial of impeachment to prove the wicked or unlawful intention of the respondent, and it is unwise ever to aver it.

In impeachments, more than in indictments, the averring of the fact charged carries with it all that it is necessary to say about intent. In indictments you charge that the defendant, "instigated by the devil," and so on; and you might as well call on the prosecution to prove the presence, shape, and color of his majesty, as to call upon the managers in impeachment to prove intention. I go further than some, and contend that no corrupt or wicked motive need instigate the acts for which impeachment is brought. It is enough that they were official violations of law. The counsel have placed great stress upon the necessity of proving that they were wilfully done. If by that he means that they were voluntarily done, I agree with him. A mere accidental trespass would not be sufficient to convict. But that which is *voluntarily* done is *wilfully* done, according to every honest definition; and whatever malfeasance is willingly perpetrated by an office-holder is a misdemeanor in office, whatever he may allege was his intention.

The President justifies himself by asserting that all previous Presidents had exercised the same right of removing officers, for cause to be judged of by the President alone. Had there been no law to prohibit it when Mr. Stanton was removed the cases would have been parallel, and the one might be adduced as an argument in favor of the other. But, since the action of any of the Presidents to which he refers, a law had been passed by Congress, after a stubborn controversy with the Executive, denying that right and prohibiting it in future, and imposing a severe penalty upon any executive officer who should exercise it; and that, too, after the President had himself made issue on its constitutionality and been defeated. No pretext, therefore, any longer existed that such right was vested in the President by virtue of his office. Hence the attempt to shield himself under such practice is a most lame evasion of the question at issue. Did he "take care that this law should be faithfully" executed? He answers that acts that would have violated the law, had it existed, were practiced by his predecessors. How does that justify his own malfeasance?

The President says that he removed Mr. Stanton simply to test the constitutionality of the tenure-of-office law by a judicial decision. He has already seen it tested and decided by the votes, twice given, of two-thirds of the senators and of the House of Representatives. It stood as a law upon the statute-books. No case had arisen under that law, or is referred to by the President, which required any judicial interposition. If there had been, or should be, the courts were open to any one who felt aggrieved by the action of Mr. Stanton. But instead of enforcing that law he takes advantage of the name and the funds of the United States to resist it, and to induce others to resist it. Instead of attempting, as the Executive of the United States, to see that that law was faithfully executed, he took great pains and perpetrated the acts alleged in this article, not only to resist it himself, but to seduce others to do the same. He sought to induce the General-in-chief of the army to aid him in an open, avowed obstruction of the law as it stood unrepealed upon the statute-book. He could find no one to unite with him in perpetrating such an act until he sunk down upon the unfortunate individual bearing the title of Adjutant General of the army. Is this taking care that the laws shall be faithfully executed? Is this attempting to carry

them into effect, by upholding their validity, according to his oath? On the other hand, was it not a high and bold attempt to obstruct the laws and take care that they should not be executed? He must not excuse himself by saying that he had doubts of its constitutionality and wished to test it. What right had he to be hunting up excuses for others, as well as himself, to violate this law? Is not this confession a misdemeanor in itself?

The President asserts that he did not remove Stanton under the tenure-of-office law. This is a direct contradiction of his own letter to the Secretary of the Treasury, in which, as he was bound by law, he communicated to that officer the fact of the removal. This portion of the answer may, therefore, be considered as disposed of by the non-existence of the fact, as well as by his subsequent report to the Senate.

The following is the letter just alluded to, dated August 14, 1867:

SIR: In compliance with the requirements of the act entitled "An act to regulate the tenure of certain civil offices," you are hereby notified that on the 12th instant Hon. Edwin M. Stanton was suspended from his office as Secretary of War, and General U. S. Grant authorized and empowered to act as Secretary *ad interim*.

HON. SECRETARY OF THE TREASURY.

Wretched man! A direct contradiction of his solemn answer! How necessary that a man should have a good conscience or a good memory! Both would not be out of place. How lovely to contemplate what was so assiduously inculcated by a celebrated pagan into the mind of his son: "Virtue is truth, and truth is virtue." And still more, virtue of every kind charms us, yet that virtue is strongest which is effected by justice and generosity. Good deeds will never be done, wise acts will never be executed, except by the virtuous and the conscientious.

May the good people of this republic remember this good old doctrine when they next meet to select their rulers, and may they select only the brave and the virtuous.

Has it been proved, as charged in this article, that Andrew Johnson in vacation suspended from office Edwin M. Stanton, who had been duly appointed and was then executing the duties of Secretary of the Department of War, without the advice and consent of the Senate; did he report the reasons for such suspension to the Senate within twenty days from the meeting of the Senate; and did the Senate proceed to consider the sufficiency of such reasons? Did the Senate declare such reasons insufficient, whereby the said Edwin M. Stanton became authorized to forthwith resume and exercise the functions of Secretary of War, and displace the Secretary *ad interim*, whose duties were then to cease and terminate; did the said Andrew Johnson, in his official character of President of the United States, attempt to obstruct the return of the said Edwin M. Stanton and his resumption forthwith of the functions of his office as Secretary of the Department of War; and has he continued to attempt to prevent the discharge of the duties of said office by said Edwin M. Stanton, Secretary of War, notwithstanding the Senate decided in his favor? If he has, then the acts in violation of law, charged in this article, are full and complete.

The proof lies in a very narrow compass, and depends upon the credibility of one or two witnesses, who, upon this point, corroborate each other's evidence.

Andrew Johnson, in his letter of the 31st of January, 1868, not only declared that such was his intention, but reproached U. S. Grant, General, in the following language:

You had found in our first conference "that the President was desirous of keeping Mr. Stanton out of office, *whether sustained in the suspension or not.*" You knew what reasons had induced the President to ask from you a promise; you also knew that in case your views of duty did not accord with his own convictions it was his purpose to fill your place by another appointment. Even ignoring the existence of a positive understanding between us, these conclusions were plainly deducible from our various conversations. It is certain, however, that even under these circumstances you did not offer to return the place to my possession, but, according to your own statement, placed yourself in a position where, could I

have anticipated your action, I would have been compelled to ask of you, as I was compelled to ask of your predecessor in the War Department, a letter of resignation, or else to resort to the more disagreeable expedient of suspending you by a successor.

He thus distinctly alleges that the General had a full knowledge that such was his deliberate intention. Hard words and injurious epithets can do nothing to corroborate or to injure the character of a witness; but if Andrew Johnson be not wholly destitute of truth and a shameless falsifier, then this article and all its charges are clearly made out by his own evidence.

Whatever the respondent may say of the reply of U. S. Grant, General, only goes to confirm the fact of the President's lawless attempt to obstruct the execution of the act specified in the article.

If General Grant's recollection of his conversation with the President is correct, then it goes affirmatively to prove the same fact stated by the President, although it shows that the President persevered in his course of determined obstruction of the law, while the General refused to aid in its consummation. No differences as to the main fact of the attempt to violate and prevent the execution of the law exist in either statement; both compel the conviction of the respondent, unless he should escape through other means than the facts proving the article. He cannot hope to escape by asking this high court to declare the "law for regulating the tenure of certain civil offices" unconstitutional and void; for it so happens, to the hopeless misfortune of the respondent, that almost every member of this high tribunal has more than once, twice, perhaps three times, declared upon his official oath that law constitutional and valid. The unhappy man is in this condition: he has declared himself determined to obstruct that act; he has, by two several letters of authority, ordered Lorenzo Thomas to violate that law; and he has issued commissions during the session of the Senate, without the advice and consent of the Senate, in violation of law, to said Thomas. He must therefore either deny his own solemn declarations and falsify the testimony of General Grant and Lorenzo Thomas, or expect that verdict whose least punishment is removal from office.

But the President denies in his answer to the first and the eleventh articles (which he intends as a joint answer to the two charges) that he had attempted to contrive means to prevent the due execution of the law regulating the tenure of certain civil offices, or had violated his oath "to take care that the laws be faithfully executed." Yet while he denies such attempt to defeat the execution of the laws, in his letter of the 31st of January, 1868, he asserts, and reproaches General Grant by the assertion, that the General knew that his object was to prevent Edwin M. Stanton from forthwith resuming the functions of his office, notwithstanding that the Senate might decide in his favor; and the President and U. S. Grant, General, in their angry correspondence of the date heretofore referred to, made an issue of veracity—the President asserting that the General had promised to aid him in defeating the execution of the laws by preventing the immediate resumption of the functions of Secretary of War by Edwin M. Stanton, and that the General violated his promise; and U. S. Grant, General, denying ever having finally made such promise, although he agrees with the President that the President did attempt to induce him to make such promise and to enter into such an arrangement.

Now, whichever of these gentlemen may have lost his memory, and found in lieu of the truth the vision which issues from the Ivory Gate—though who can hesitate to choose between the words of a gallant soldier and the pettifogging of a political trickster?—is wholly immaterial, so far as the charge against the President is concerned. That charge is, that the President did attempt to prevent the due execution of the tenure-of-office law by entangling the General in the arrangement; and unless both the President and the General have lost their memory and mistaken the truth with regard to the promises with each other, then this charge is made out. In short, if either of these gentlemen has correctly stated

Digitized by Google

these facts of attempting the obstruction of the law the President has been guilty of violating the law and of *misprision of official perjury*.

But, again, the President alleges his right to violate the act regulating the tenure of certain civil offices, because, he says, the same was inoperative and void as being in violation of the Constitution of the United States. Does it lie in his mouth to interpose this plea? He had acted under that law and issued letters of authority, both for the long and short term, to several persons under it, and it would hardly lie in his mouth after that to deny its validity unless he confessed himself guilty of law-breaking by issuing such commissions.

Let us here look at Andrew Johnson accepting the oath "to take care that the laws be faithfully executed."

On the 2d of March, 1867, he returned to the Senate the "tenure-of-office bill"—where it originated and had passed by a majority of more than two thirds—with reasons elaborately given why it should not pass finally. Among these was the allegation of its unconstitutionality. It passed by a vote of 35 yeas to 11 nays. In the House of Representatives it passed by more than a two-thirds majority; and when the vote was announced the Speaker, as was his custom, proclaimed the vote, and declared, in the language of the Constitution, "that two-thirds of each house having voted for it, notwithstanding the objections of the President, it has become a law."

I am supposing that Andrew Johnson was at this moment waiting to take the oath of office, as President of the United States, "that he would obey the Constitution and take care that the laws be faithfully executed." Having been sworn on the Holy Evangels to obey the Constitution, and being about to depart, he turns to the person administering the oath and says, "Stop; I have a further oath. I do solemnly swear that I will not allow the act entitled 'An act regulating the tenure of certain civil offices,' just passed by Congress over the presidential veto, to be executed; but I will prevent its execution by virtue of my own constitutional power."

How shocked Congress would have been—what would the country have said to a scene equalled only by the unparalleled action of this same official, when sworn into office on that fatal 4th day of March which made him the successor of Abraham Lincoln! Certainly he would not have been permitted to be inaugurated as Vice-President or President. Yet such in effect has been his conduct, if not under oath at least with less excuse, since the fatal day which inflicted him upon the people of the United States. Can the President hope to escape if the fact of his violating that law be proved or confessed by him, as has been done? Can he expect a sufficient number of his triers to pronounce that law unconstitutional and void—those same triers having passed upon its validity upon several occasions? The act was originally passed by a vote of 29 yeas to 9 nays.

Subsequently the House of Representatives passed the bill with amendments, which the Senate disagreed to, and the bill was afterward referred to a committee of conference of the two houses, whose agreement was reported to the Senate by the managers and was adopted by a vote of 22 yeas to 10 nays.

After the veto, upon reconsideration of the bill in the Senate, and after all the arguments against its validity were spread before that body, it passed by a vote of 35 yeas to 11 nays.

The President contends that by virtue of the Constitution he has the right to remove heads of departments, and cites a large number of cases where his predecessor had done so. It must be observed that all those cases were before the passage of the tenure-of-office act, March 2, 1867. Will the respondent say how the having done an act when there was no law to forbid it justifies the repetition of the same act after a law has been passed expressly prohibiting the same. It is not the suspension or removal of Mr. Stanton that is complained of, but the manner of the suspension. If the President thought he had good

reasons for suspending or removing Mr. Stanton, and had done so, sending those reasons to the Senate, and then obeyed the decision of the Senate in their finding, there would have been no complaint; but instead of that he suspends him in direct defiance of the tenure-of-office law, and then enters into an arrangement, or attempts to do so, in which he thought he had succeeded, to prevent the due execution of the law after the decision of the Senate. And when the Senate ordered him to restore Mr. Stanton he makes a second removal by virtue of what he calls the power vested in him by the Constitution.

The action of the Senate on the message of the President, communicating his reasons for the suspension of E. M. Stanton, Secretary of War, under the act entitled "An act to regulate the tenure of certain civil offices," was as follows:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
January 13, 1868.

Resolved, That having considered the evidence and reasons given by the President in his report of December 12, 1867, for the suspension from the office of Secretary of War of Edwin M. Stanton, the Senate do not concur in such suspension.

And the same was duly certified to the President, in the face of which he, with an impudence and brazen determination to usurp the powers of the Senate, again removed Edwin M. Stanton, and appointed Lorenzo Thomas Secretary *ad interim* in his stead. The Senate, with calm manliness, rebuked the usurper by the following resolution:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
February 21, 1868.

Whereas the Senate has received and considered the communication of the President stating that he had removed Edwin M. Stanton, Secretary of War, and had designated the Adjutant General of the army to act as Secretary of War *ad interim*: Therefore,

Resolved by the Senate of the United States, That under the Constitution and laws of the United States, the President has no power to remove the Secretary of War and to designate any other officer to perform the duties of that office *ad interim*.

Yet he continued him in office. And now this offspring of assassination turns upon the Senate, who have thus rebuked him in a constitutional manner, and bids them defiance. How can he escape the just vengeance of the law? Wretched man, standing at bay, surrounded by a cordon of living men, each with the axe of an executioner uplifted for his just punishment. Every senator now trying him, except such as had already adopted his policy, voted for this same resolution, pronouncing his solemn doom. Will any one of them vote for his acquittal on the ground of its unconstitutionality? I know that senators would venture to do any necessary act if indorsed by an honest conscience or an enlightened public opinion; but neither for the sake of the President nor any one else would one of them suffer himself to be tortured on the gibbet of everlasting obloquy. How long and dark would be the track of infamy which must mark his name, and that of his posterity! Nothing is therefore more certain than that it requires no gift of prophecy to predict the fate of this unhappy victim.

I have now discussed but one of the numerous articles, all of which I believe to be fully sustained, and few of the almost innumerable offences charged to this wayward, unhappy official. I have alluded to two or three others which I could have wished to have had time to present and discuss, not for the sake of punishment, but for the benefit of the country. One of these was an article charging the President with usurping the legislative power of the nation, and attempting still his usurpation.

With regard to usurpation, one single word will explain my meaning. A civil war of gigantic proportions, covering sufficient territory to constitute many States and nations, broke out, and embraced more than ten millions of men, who formed an independent government, called the Confederate States of America. They rose to the dignity of an independent belligerent, and were so acknowledged by all civilized nations, as well as by ourselves. After expensive and bloody strife

we conquered them, and they submitted to our arms. By the law of nations, well understood and undisputed, the conquerors in this unjust war had the right to deal with the vanquished as to them might seem good, subject only to the laws of humanity. They had a right to confiscate their property to the extent of indemnifying themselves and their citizens; to annex them to the victorious nation, and pass just such laws for their government as they might think proper.

This doctrine is as old as Grotius and as fresh as the Dorr rebellion. Neither the President nor the judiciary had any right to interfere, to dictate any terms, or to aid in reconstruction further than they were directed by the sovereign power. That sovereign power in this republic is the Congress of the United States. Whoever, besides Congress, undertakes to create new States or to rebuild old ones, and fix the condition of their citizenship and union, usurps powers which do not belong to him, and is dangerous or not dangerous according to the extent of his power and his pretensions. Andrew Johnson did usurp the legislative power of the nation by building new States, and reconstructing, as far as in him lay, this empire. He directed the defunct States to come forth and live by virtue of his breathing into their nostrils the breath of life. He directed them what constitutions to form, and fixed the qualifications of electors and of office-holders. He directed them to send forward members to each branch of Congress, and to aid him in representing the nation. When Congress passed a law declaring all these doings unconstitutional, and fixed a mode for the admission of this new territory into the nation, he proclaimed it unconstitutional, and advised the people not to submit to it nor to obey the commands of Congress. I have not time to enumerate the particular acts which constitute his high-handed usurpations. Suffice it to say that he seized all the powers of the government within these States, and, had he been permitted, would have become their absolute ruler. This he persevered in attempting notwithstanding Congress declared more than once all the governments which he thus created to be void and of none effect.

But I promised to be brief, and must abide by the promise, although I should like the judgment of the Senate upon this, to me, seeming vital phase and real purpose of all his misdemeanors. To me this seems a sublime spectacle. A nation, not free, but as nearly approaching it as human institutions will permit of, consisting of thirty millions of people, had fallen into conflict, which among other people always ends in anarchy or despotism, and had laid down their arms, the mutineers submitting to the conquerors. The laws were about to regain their accustomed sway, and again to govern the nation by the punishment of treason and the reward of virtue. Her old institutions were about to be reinstated so far as they were applicable, according to the judgment of the conquerors. Then one of their inferior servants, instigated by unholy ambition, sought to seize a portion of the territory according to the fashion of neighboring anarchies, and to convert a land of freedom into a land of slaves. This people spurned the traitors, and have put the chief of them upon his trial, and demand judgment upon his misconduct. He will be condemned, and his sentence inflicted without turmoil, tumult, or bloodshed, and the nation will continue its accustomed course of freedom and prosperity without the shedding any further of human blood, and with a milder punishment than the world has been accustomed to see, or perhaps than ought now to be inflicted.

Now, even if the pretext of the President were true, and not a mere subterfuge to justify the chief act of violation with which he stands charged, still that would be such an abuse of the patronage of the government as would demand his impeachment for a high misdemeanor. Let us again, for a moment, examine into some of the circumstances of that act. Mr. Stanton was appointed Secretary of War by Mr. Lincoln in 1862, and continued to hold under Mr. Johnson, which, by all usage, is considered a reappointment. Was he a faithful officer, or was he removed for corrupt purposes? After the death of Mr. Lincoln,

Andrew Johnson had changed his whole code of politics and policy, and instead of obeying the will of those who put him into power, he determined to create a party for himself, to carry out his own ambitious purposes. For every honest purpose of government, and for every honest purpose for which Mr. Stanton was appointed by Mr. Lincoln, where could a better man be found? None ever organized an army of a million of men, and provided for its subsistence and efficient action, more rapidly than Mr. Stanton and his predecessor.

It might with more propriety be said of this officer than of the celebrated Frenchman, that he "organized victory." He raised and by his requisitions distributed more than a billion dollars annually, without ever having been charged or suspected with the malappropriation of a single dollar; and when victory crowned his efforts he disbanded that immense army as quietly and peacefully as if it had been a summer parade. He would not, I suppose, adopt the personal views of the President; and for this he was suspended until restored by the emphatic verdict of the Senate. Now, if we are right in our narrative of the conduct of these parties and the motives of the President, the very effort at removal was a high-handed usurpation as well as a corrupt misdemeanor for which of itself he ought to be impeached and thrown from the place he was abusing. But he says that he did not remove Mr. Stanton for the purpose of defeating the tenure-of-office law. Then he forgot the truth in his controversy with the General of the army. And because the General did not aid him, and finally admit that he had agreed to aid him in resisting that law, he railed upon him like a very drab.

The counsel for the respondent allege that no removal of Mr. Stanton ever took place, and that therefore the sixth section of the act was not violated. They admit that there was an order of removal and a rescission of his commission; but, as he did not obey it, they say it was no removal. That suggests the old saying that it used to be thought that "when the brains were out the man was dead." That idea is proved by learned counsel to be absolutely fallacious. The brain of Mr. Stanton's commission was taken out by the order of removal—the rescission of his commission—and his head was absolutely cut off by that gallant soldier, General Thomas, the night after the masquerade. And yet, according to the learned and delicate counsel, until the mortal remains, everything which could putrefy, was shovelled out and hauled into the muck-yard there was no removal. But it is said that this took place merely as an experiment to make a judicial case. Now, suppose there is anybody who, with the facts before him, can believe that this was not an afterthought, let us see if that palliates the offence.

The President is sworn to take care that the laws be faithfully executed. In what part of the Constitution or laws does he find it to be his duty to search out for defective laws that stand recorded upon the statutes in order that he may advise their infraction? Who was aggrieved by the tenure-of-office bill that he was authorized to use the name and the funds of the government to relieve? Will he be so good as to tell us by what authority he became the obstructor of an unrepealed law instead of its executor, especially a law whose constitutionality he had twice tested? If there were nothing else than his own statement he deserves the contempt of the American people, and the punishment of its highest tribunal. If he were not willing to execute the laws passed by the American Congress and unrepealed, let him resign the office which was thrown upon him by a horrible convulsion and retire to his village obscurity. Let him not be so swollen by pride and arrogance, which sprang from the deep misfortune of his country, as to attempt an entire revolution of its internal machinery, and the disgrace of the trusted servants of his lamented predecessor.

The gentleman [Mr. Groesbeck] in his peroration on Saturday implored the sympathy of the Senate with all the elegance and pathos of a Roman senator pleading for virtue; and it is to be feared that his grace and eloquence turned the attention of the Senate upon the orator rather than upon the accused. Had

he been pleading for innocence his great powers would have been well exerted. Had he been arguing with equal eloquence before a Roman senate for such a delinquent, and Cato, the Censor, had been one of the judges, his client would have soon found himself in the stocks in the middle of the forum instead of receiving the sympathy of a virtuous and patriotic audience.

[Mr. Manager Stevens read a portion of his argument standing at the Secretary's desk; but after proceeding a few minutes, being too feeble to stand, obtained permission to take a seat, and having read nearly half an hour from a chair until his voice became almost too weak to be heard, handed over his manuscript to Mr. Manager Butler, who concluded the reading.]

Hon. THOMAS WILLIAMS, one of the managers on behalf of the House of Representatives, next addressed the Senate as follows:

Mr. PRESIDENT AND SENATORS OF THE UNITED STATES: Not unused to the conflicts of the forum, I appear in your presence to-day in obedience to the command of the representatives of the American people, under a sense of responsibility which I have never felt before. This august tribunal, whose judges are the elect of mighty provinces; the presence at your bar of the representatives of a domain that rivals in extent the dominion of the Cæsars, and of a civilization that transcends any that the world has ever seen, to demand judgment upon the high delinquent whom they have arraigned in the name of the American people for high crimes and misdemeanors against the state; the dignity of the delinquent himself, a king in everything but the name and paraphernalia and inheritance of royalty; these crowded galleries; and, more than all, that greater world outside which stands on tiptoe as it strains its ears to catch from the electric messenger the first tidings of a verdict which is either to send a thrill of joy through an afflicted land, or to rack it anew with the throes of anarchy and the convulsions of despair, all remind me of the colossal proportions of the issue you are assembled to try. I cannot but remember, too, that the scene before me is without example or parallel in human history. Kings, it is true, have been uncrowned, and royal heads have fallen upon the scaffold, but in two single instances only, as I think, have the formalities of law been ostensibly invoked to give a coloring of order and of justice to the bloody tragedy. It is only in this free land that a constitutional tribunal has been charged for the first time with the sublime task of vindicating an outraged law against the highest of its ministers, and passing judgment upon the question whether the ruler of a nation shall be stripped, under the law and without shock or violence, of the power which he has abused.

This great occasion was not sought by us. The world will bear the representatives of the people witness that they have not come here for light and transient causes, but for the reason only that this issue has been forced upon them by a long series of bold assumptions of power on the part of the Executive, following each other with almost the blazing and blinding continuity of the lightning of the tropics, and culminating at last in a mortal challenge, which in the defence of their constitutional power as a branch of the American Congress, and as faithful sentinels over the liberties of the people, it was impossible for them to decline. With the first, open defiance of the legislative will they were left, of course, with no alternative but to abdicate their rule or to vindicate their right to make the law and see that it was obeyed. To this imperious necessity the people, in whose name they speak—a branch of that race whose quick sensibility to public danger has ever kept a sleepless vigil over its liberties—have yielded at last with a reluctance which nothing but the weariness of civil strife, the natural longing for repose, the apprehensive sense that it was "better, perhaps, to bear the ills we had than fly to others that we knew not of"—the reflection that this administration must have an end, and above all, perhaps, the delusive hope that its law-defying head himself would ultimately submit to a necessity which was as strong as fate, could have brought about, or would have,

perhaps, excused. He has misunderstood their reasons, as his counsel show that they do now, mistaken their temper, and presumed upon their forbearance. He has forgotten that there was a point at which the conflict must end in the shock of two opposing forces, and the overthrow of one or other of the antagonistic elements. It was necessary, perhaps, in the order of Providence that he should reach that point by striking such a blow at the public liberties as should awaken the people as with an earthquake shock to the consciousness that the toleration of usurpation brings no security to nations.

To show, however, how much they have borne and forborne, perhaps forgiven, for the sake of peace, and how much they now pass over for the sake of a speedy solution of the impending trouble which has impeded the onward and upward movement of this great government, and spread confusion and disorder through many of its departments, and what, moreover, is the true import and significance of the acts for which the President is now arraigned, I must be allowed, with your indulgence, to take up for a moment the key which is required to unlock the mysteries of the position. The man who supposes that this is but a question of the removal of an obnoxious officer, a mere private quarrel between two belligerents at the other end of the avenue, wherein it is of no great national consequence which of the opposing parties shall prevail, has no adequate apprehension of the gravity of the case, and greatly disparages the position and the motives of the high accusers. The House of Representatives espouses no man's quarrel, however considerable he may be. It has but singled out from many others of equal weight the facts now charged, as facts for the most part of recent occurrence, of great notoriety, and of easy proof, by way of testing a much greater question without loss of time. The issue here is between two mightier antagonists, one the Chief Executive Magistrate of this nation and the other the people of the United States, for whom the Secretary of War now holds almost the only strong position of which they have not been dispossessed. It is but a renewal on American soil of the old battle between the royal prerogative and the privileges of the Commons, which was closed in England with the reign of the Stuarts—a struggle for the mastery between a temporary executive and the legislative power of a free state over the most momentous question that has ever challenged the attention of a people. The counsel for the President, reflecting, of course, the views of their employer, would have you to believe that the removal of a departmental head is an affair of state too small to be worthy of such an avenger as this which we propose. Standing alone, stripped of all the attendant circumstances that explain the act and show the deadly *animus* by which it was inspired, it is not improbable that there are some who might have been induced to think, with them, that a remedy so extreme as this was more than adequate. It is only under the light shed upon the particular issue by antecedent facts which have now passed into history that the giant proportions of this controversy can be fully seen, if they are not made sufficiently apparent now by the defiant tone of the President and the formidable pretensions set up by him in his thoughtfully considered and painfully elaborated plea.

The not irrelevant question "Who is Andrew Johnson?" has been asked by one of his counsel, as it has often been by himself, and answered in the same way, by showing who he *was* and what he had done before the people of the loyal States so generously intrusted him with that contingent power which was made absolute only for the advantage of defeated and discomfited treason by the murderous pistol of an assassin. I will not stop now to inquire as to scenes enacted on this floor so eloquently rehearsed by the counsel for the President, with two pictures of so opposite a character before me, or even to inquire whether his resistance to the hegira of the southern senators was not merely a question, himself being the witness, as to the propriety and wisdom of such a step at that particular time. The opportunity occurs just here to answer it as it is put, by showing who Andrew Johnson *is*, and what he has been since

Digitized by Google

the unhappy hour of that improvident and unreflecting gift. *Eheu! quantum mutatus ab illo!* Alas, how changed, how fallen from that high estate that won for him the confidence of a too confiding people! Would that it could have been said of him as of that apostate spirit who was hurled in hideous ruin and combustion down from Heaven's crystal battlements, that even in his fall he "had not yet lost all his original brightness nor appeared less than archangel ruined."

The master-key to the whole history of his administration, which has involved not a mere harmless difference of opinion, as one of his counsel seems to think, on a question where gentlemen might afford to disagree without a quarrel, but one long and unseemly struggle by the Executive against the legislative power, is to be found in the fact of an early and persistent purpose of forcing the rebel States into the Union by means of his executive authority, in the interests of the men who had lifted their parricidal hands against it, on terms dictated by himself, and in defiance of the will of the loyal people of the United States as declared through their representatives. To accomplish this object, how much has he not done and how much has a long-suffering people not passed over without punishment and almost without rebuke? Let history, let our public records, which are the only authentic materials of history, answer, and they will say that—

For this, instead of convening the Congress in the most momentous crisis of the state, he had issued his royal proclamations for the assembling of conventions and the erection of State governments, prescribing the qualification of the voters, and settling the conditions of their admission into the Union.

For this he had created offices unknown to the law, and filled them with men notoriously disqualified by law, at salaries fixed by his own mere will.

For this he had paid those officers in contemptuous disregard of law, and paid them, too, out of the contingent fund of one of the departments of the government.

For this he had supplied the expenses of his new government by turning over to them the spoils of the dead confederacy, and authorizing his satraps to levy taxes from the conquered people.

For this he had passed away unnumbered millions of the public property to rebel railroad companies without consideration, or sold it to them in clear violation of law, on long credits, at a valuation of his own and without any security whatever.

For this he had stripped the Bureau of Freedmen and Refugees of its munificent endowments, by tearing from it the lands appropriated by Congress to the loyal wards of the republic, and restoring to the rebels their justly forfeited estates after the same had been vested by law in the government of the United States.

For this he had invaded with a ruthless hand the very penetralia of the treasury, and plundered its contents for the benefit of favored rebels by ordering the restoration of the proceeds of sales of captured and abandoned property which had been placed in its custody by law.

For this he had grossly abused the pardoning power conferred on him by the Constitution in releasing the most active and formidable of the leaders of the rebellion with a view to their service in the furtherance of his policy, and even delegated that power for the same objects to men who were indebted to its exercise for their own escape from punishment.

For this he had obstructed the course of public justice not only by refusing to enforce the laws enacted for the suppression of the rebellion and the punishment of treason, but by going into the courts and turning the greatest of the public malefactors loose, and surrendering all control over them by the restoration of their estates.

For this he had abused the appointing power by the removal on system of meritorious public officers for no other reason than because they would not

assist him in his attempt to overthrow the Constitution and usurp the legislative power of the government.

For this he had invaded the rightful privileges of the Senate by refusing to send in nominations of officers appointed by him during the recess of that body, and after their adjournment reappointing others who had been rejected by them as unfit for the places for which they had been appointed.

For this he had broken the privileges of and insulted the Congress of the United States by instructing them that the work of reconstruction belonged to him only, and that they had no legislative right or duty in the premises, but only to register his will by throwing open their doors to such claimants as might come there with commissions from his pretended governments, that were substantially his own.

For this, on their refusal to obey his imperial rescript, he had arraigned them publicly as a revolutionary assembly and not a Congress, without the power to legislate for the States excluded, and as "traitors, at the other end of the line," in actual rebellion against the people they had subdued.

For this he had grossly abused the veto power, by disapproving every important measure of legislation that concerned the rebel States, in accordance with his public declaration that he would veto all the measures of the law-making power whenever they came to him.

For this he had deliberately and confessedly exercised a dispensing power over the test-oath law, by appointing notorious rebels to important places in the revenue service, on the avowed ground that the policy of Congress, in that regard, was not in accordance with his opinions.

For this he had obstructed the settlement of the nation, by exerting all his influence to prevent the people of the rebel States from accepting the constitutional amendment or organizing under the laws of Congress, and impressing them with the opinion that Congress was blood-thirsty and implacable, and that their only refuge was with him.

For this he had brought the patronage of his office into conflict with the freedom of elections, by allowing and encouraging his official retainers to travel over the country, attending political conventions and addressing the people in support of his policy.

For this, if he did not enact the part of a Cromwell, by striding into the halls of the representatives of the people and saying to one man, "you are a hypocrite;" to another, "you are a whoremonger;" to a third, "you are an adulterer;" and to the whole, "you are no longer a parliament;" he had rehearsed the same part substantially outside, by travelling over the country, and, in indecent harangues, assailing the conduct and impeaching the motives of its Congress, inculcating disobedience to its authority by endeavoring to bring it into disrepute, declaring publicly of one of its members that he was a traitor, of another that he was an assassin, and of the whole that they were no longer a Congress.

For this, in addition to the oppression and bloodshed that had everywhere resulted from his known partiality for traitors, he had winked at, if not encouraged, the murder of loyal citizens in New Orleans by a confederate mob by holding correspondence with its leaders, denouncing the exercise of the right of a political convention to assemble peacefully in that city as an act of treason proper to be suppressed by violence, and commanding the military to assist, instead of preventing, the execution of the avowed purpose of dispersing them.

For this, it is not too much to say, in view of the wrong and outrage and the cry of suffering that have come up to us upon every southern breeze, that he had in effect reopened the war, inaugurated anarchy, turned loose once more the incarnate devil of baffled treason and unappeasable hate, whom, as we fondly thought, our victories had overthrown and bound in chains, ordained rapine and murder from the Potomac to the Gulf, and deluged the streets of Memphis as

Digitized by Google

well as of New Orleans, and the green fields of the south, already dotted with so many patriot graves, with the blood of martyred citizens.

And because for all he has not been called to render an account, for the reasons that have been already named, it is now assumed and argued by his counsel that he stands acquitted by a judgment which disapproves its truth, although it rests for the most part on record evidence, importing that "absolute verity," which is, of course, not open to dispute. This extraordinary assumption is but another instance of that incorrigible blindness on the part of the President in regard to the feelings and motives of Congress that has helped to hurry him into his present humiliating predicament as a criminal at your bar.

But all these things were not enough. It wanted one drop more to make the cup of forbearance overflow—one other act that should reach the sensorium of the nation, and make even those who might be slow to comprehend a principle, to understand that further forbearance was ruin to us all; and that act was done in the attempt to seize by force or stratagem on that department of the government through which its armies were controlled. It was but a logical sequence of what had gone before—the last of a series of usurpations, all looking to the same great object. It did not rise, perhaps, beyond the height of many of the crimes by which it was ushered in. But its meaning could not be mistaken. It was an act that smote upon the nerve of the nation in such a way as to render it impossible that it could be either concealed, disparaged, or excused, as were the muffled blows of the pick-axe that had been so long silently undermining the bastions of the republic. It has been heard and felt through all our wide domain like the reverberation of the guns that opened their iron throats upon our flag at Sumter; and it has stirred the loyal heart of the people again with the electric power that lifted it to the height of the sublimest issue that ever led a martyr to the stake or a patriot to the battle-field. That people is here to-day, through its representatives, on your floor and in your galleries, in the persons alike of the veterans who have been scarred by the iron hail of battle, and of the mothers and wives and daughters of those who have died that the republic might live, as well as of the commissioned exponents of the public will, to demand the rewards of their sacrifices and the consummation of their triumph in the award of a nation's justice upon this high offender.

And now as to the immediate issue, which I propose to discuss only in its constitutional and legal aspects.

The great crime of Andrew Johnson, as already remarked, running through all his administration, is that he has violated his oath of office and his constitutional duties by the obstruction and infraction of the Constitution and the laws, and an endeavor to set up his own will against that of the law-making power, with a view to a settled and persistent purpose of forcing the rebel States into Congress on his own terms, in the interests of the traitors, and in defiance of the will of the loyal people of the United States.

The specific offences charged here, which are but the culminating facts, and only the last of a long series of usurpations, are an unlawful attempt to remove the rightful Secretary of War and to substitute in his place a creature of his own, without the advice and consent of the Senate, although then in session; a conspiracy to hinder and prevent him from resuming or holding the said office after the refusal of the Senate to concur in his suspension, and to seize, take, and possess the property of the United States in said department; an attempt to debauch an officer of the army from his allegiance by inculcating insubordination to the law in furtherance of the same object; the attempt to set aside the rightful authority of Congress and to bring it into public odium and contempt, and to encourage resistance to its laws by the open and public delivery of indecent harangues, impeaching its acts and purposes and full of threats and menaces against it and the laws enacted by it, to the great scandal and degradation of his own high office as President; and the devising and contriving of

Digitized by Google

unlawful means to prevent the execution of the tenure-of-office, army appropriation, and reconstruction acts of March 2, 1867.

To all of these which relate to the attempted removal of the Secretary of War the answer is:

1. That the case of Mr. Stanton is not within the meaning of the first section of the tenure-of-office act.

2. That if it be so, the act is unconstitutional and void so far as it undertakes to abridge the power claimed by him of "removing at any and all times all executive officers for causes to be judged of by himself alone," as well as of suspending them indefinitely at his sovereign will and pleasure; and,

3. That whether the act be constitutional or otherwise, it was his right, as he claims it to have been his purpose, to disobey and violate it with a view to the settlement of the question of its validity by the judiciary of the United States.

And first, as to the question whether the present Secretary of War was intended to be comprehended within the first section of the act referred to.

The defendant insists that he was not, for the reason that he derived his commission from Mr. Lincoln, and not being removed on his accession, continued by reason thereof to hold the office and administer its duties at his pleasure only, without having at any time received any appointment from himself; assuming, as I understand, either that under the proviso to the first section of this act the case was not provided for, or that by force of its express language, his office was determined by the expiration of the first term of the President who appointed him.

The body, or enacting clause of this section, provides that *every* person then holding any civil office who had been appointed thereto by and with the advice and consent of the Senate, or who should be thereafter appointed to any such office, should be entitled to hold until a successor is appointed in the like manner.

It is clear, therefore, that its general object was to provide for all cases, either then existing or to happen in the future.

It is objected, however, that so much of this clause as refers to the heads of departments is substantially repealed by the saving clause, which is in the following words:

Provided, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

This proviso was the result of a conference on the disagreeing votes on the amendment of the House striking out the exception in favor of the heads of departments, and was suggested—if he may be excused the egotism—by the individual who now addresses you, and to whom, as the mover and advocate of the amendment, was very naturally assigned the duty of conducting the negotiation on the part of the House, for the purpose of obviating the objection taken in debate on this floor by one of the Senate managers, that the effect of the amendment would be to impose on an incoming President a cabinet that was not of his own selection. I may be excused for speaking of its actual history, because that has been made the subject of comment by the learned counsel who opened this case on behalf of the President. If it was intended or expected that it should so operate as to create exceptions in favor of an officer whose notorious abuse of power was the proximate cause, if not the impelling motive for the enactment of the law, I did not know it. It will be judged, however, by itself, without reference either to the particular intent of him who may have penned it, or to any hasty opinion that may have been expressed in either house as to the construction of which it might be possibly susceptible.

The argument of the defendant rests upon the meaning of the word "ap-

Digitized by Google

pointed." That word has both a technical and a popular one. In the former, which involves the idea of a nomination and confirmation in the constitutional way, there was no appointment certainly by Mr. Johnson. In the latter, which is the sense in which the people will read it, there unquestionably was. What, then, was meant by the employment of this word?

It is a sound and well-accepted rule in all the courts, in exploring the meaning of the law-giver, especially in cases of remedial statutes, as I think this is, if it is not rather to be considered as only a declaratory one in this particular, to look to the old law, the mischief and the remedy, and to give a liberal construction to the language *in favorem libertatis*, in order to repress the mischief and advance the remedy; taking the words used in their ordinary and familiar sense, and varying the meaning as the intent, which is always the polar star, may require. Testing the case by this rule, what is to be the construction here?

The old law was—not the Constitution—but a vicious practice that had grown out of a precedent involving an early and erroneous construction of that instrument, if it was intended so to operate. The mischief was that this practice had rendered the officers of the government, and among them the heads of departments, the most powerful and dangerous of them all, from their assumed position of advisers of the President, by the very dependency of their tenure, the mere ministers of his pleasure, and the slaves of his imperial will, that could at any moment, and as the reward of an honest and independent opinion, strip them of their employments, and send them back into the ranks of the people. The remedy was to change them from minions and flatterers into *men*, by making them free, and to secure their loyalty to the law by protecting them from the power that might constrain their assent to its violation. To accomplish this object it was necessary that the law should cover all of them, high and low, present and prospective. That it could have been intended to except the most important and formidable of these functionaries, either with a view to favor the present Executive, or for the purpose of subjecting the only head of a department who had the confidence of Congress to his arbitrary will, is as unreasonable and improbable as it is at variance with the truth of the fact and with the obvious general purposes of the act.

For the President of the United States to say, however, now, after having voluntarily retained Mr. Stanton for more than two years of his administration, that he was there only by sufferance, or as a mere *movable*, or heirloom, or incumbrance that had passed to him with the estate, and not by virtue of his own special appointment, if not "paltering with the people in a double sense," has very much the appearance of a not very respectable quibble. The unlearned man who reads the proviso—as they for whose perusal it is intended will read it—and who is not accustomed to handle the metaphysic scissors of the professional casuists who are able "to divide a hair 'twixt west and northwest side," while he admits the ingenuity of the advocate, will stand amazed, if he does not scorn the officer who would stoop to the use of such a subterfuge.

Assuming, however, for the sake of argument, that the technical sense is to prevail, what is to be its effect? Why, only to make the law-giver enact a very unreasonable and impossible thing, by providing in words of the *future* tense, that the commission of the officer shall expire nearly two years *before* the passage of the law, which is a construction that the general rule of law forbids! To test this let us substitute for the general denominational phrases of "Secretary of War, of State, and of the Navy," the names of Messrs. Seward, Stanton, and Welles, and for that of the President who appointed them the name of Lincoln, and the clause will read: "*Provided*, That Messrs. Seward, Stanton, and Welles, shall hold their offices respectively for and during the term of Abraham Lincoln, and for one month thereafter." The effect will then be to put you in the position of having enacted not only an *absurdity*, but an *impossibility*. But on this there are at least two rules of interpretation that start up

Digitized by Google

in the way of the solution. The first is that it is not respectful to the legislature to presume that it ever intended to enact an absurdity, if the case is susceptible of any other construction; and the second that—

Acts of Parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences manifestly contradictory to common reason, they are, with regard to these collateral consequences, void. (1 *Blackstone's Commentaries*, 91.)

If the effect of the proviso, however, upon something analogous to the doctrine of *cy pres*, or, in other words, of getting as near to its meaning as possible, was to determine the office at the time of the passage of the law, then, on the other hand, the retention of the officer by the President for five months afterward, and through an intervening Congress, without a commission or even a nomination, was a breach of the law, and therefore a misdemeanor in itself; which he could hardly plead, and would scarcely ask you to affirm against the general presumption of the faithful performance of official duty for the purpose of sheltering him from the consequences of still another violation of the law.

Assuming again, however, that, as is claimed by the defence, the case of Mr. Stanton does not fall within the proviso, what then is the result? Is it the predicament of a *casus omissus* altogether? Is he to be hung up, like Mahomet's coffin, between the body of the act and the proviso, the latter nullifying the former on the pretext of an exception, and then repudiating the exception itself as to the particular case; or is the obvious and indisputable purpose of providing for all cases whatever, to be carried out by falling back on the general enacting clause which would make him irremovable by the President alone, and leaving him outside of the provision as to *tenure*, which was the sole object of the exception? There is nothing in the saving clause which is at all inconsistent with what goes before. The provision that takes every officer out of the power of the President is not departed from in that clause. All it enacts is that the tenure shall be a determinate one in cases that fall within it. If Mr. Stanton was appointed by President Johnson within the meaning of the proviso, he holds, of course, until the expiration of his term. If not, he holds subject to removal like other officers under the enacting clause. It has been so often asserted publicly as to have become a generally accredited truth, that the special purpose of the act was to protect him. I do not affirm this, and do not consider it necessary that I should, or important to the case whether he favored the passage of the law or not. It will be hardly pretended, however, by anybody, that he was intended to be excluded entirely from its operation.

Nor is the case helped by the reference to the fourth section of the act, which provides that nothing therein contained shall be construed to extend the term of any officer the duration of which is limited by law. The office in question was one of those of which the tenure was indefinite. The construction insisted on by me does not extend it. The only effect is to take away the power of removal from the President alone and restore it to the parties by whom the Constitution intended that it should be exercised.

Assuming, then, that the case of Mr. Stanton is within the law, the next question is as to the validity of the law itself. And here we are met, for the first time in our history as a nation, by the assertion, on the part of the President, of the illimitable and uncontrollable power under the Constitution, in accordance, as he insists, with the judicial opinion, the professional sentiment, and the settled practice under the government of removing at any and all times all executive officers whatever, without responsibility to anybody, and as included therein the equally uncontrollable power of suspending them indefinitely and supplying their places from time to time by appointments made by himself *ad interim*. If there be any case where the claim has heretofore extended, even in theory, beyond the mere power to create a vacancy by removal during the recess of the Senate, I do not know it. If there be any wherein the power to suspend

indefinitely, which goes even beyond this, has been asserted, it is equally new to me. This truly regal pretension has been fitly reserved for the first President who has ever claimed the imperial prerogative of founding governments by proclamation, of taxing without a Congress, of disposing of the public property by millions at his own will, and of exercising a dispensing power over the laws. It is but a logical sequence of what he has been already permitted to do with absolute impunity and almost without complaint. If he could be tolerated thus far, why not consummate the work which was to render him supreme, and crown his victory over the legislative power by setting this body aside as an advisory council, and claiming himself to be the rightful interpreter of the laws? The defence made here is a defiance, a challenge to the Senate and the nation, that must be met and answered just now in such a way as shall determine which, if any, is to be the master. If the claim asserted is to be maintained by your decision, all that will remain for you will be only the formal abdication of your high trust as part of the appointing power, because there will be then absolutely nothing left of it that is worth preserving.

But let us see what there is in the Constitution to warrant these extravagant pretensions, or to prevent the passage of a law to restore the practice of this government to the true theory of that instrument.

I do not propose to weary you with a protracted examination of this question. I could not add to what I have already said on the same subject in the discussion in the House of the bill relating to removals from office in December, 1866, to which I would have ventured to invite your attention, if the same point had not been so fully elaborated here. You have already passed upon it in the enactment of the present law by a vote so decisive and overwhelming, and there is so little objection on the part of the counsel for the President to the validity of that law, that I may content myself with condensing the arguments on both sides into a few general propositions which will comprehend their capital features.

The case may be stated, as I think, analytically and synoptically thus:

The first great fact to be observed is, that while the Constitution enumerates sundry offices, and provides the manner of appointment in those cases, as well as in "all others to be created by law," it prescribes no tenure except that of good behavior in the case of the judges, and is entirely silent on the subject of removal by any other process than that of impeachment.

From this the inferences are:

1. That the tenure of good behavior, being substantially equivalent to that for life, the office must in all other cases be determinable at the will of some department of the government, unless limited by law; which is, however, but another name for the will of the law-maker himself. And this is settled by authority.

2. That the power of removal at will, being an implied one only, is to be confined to those cases where the tenure is not ascertained by law; the right of removal in any other form than by the process of impeachment depending entirely on the hypothesis of a will of which the essential condition always is that it is free to act without reason and without responsibility.

3. That the power of removal, being implied as a necessity of state to secure the dependence of the officer on the government, is not to be extended by construction so as to take him out of the control of the legislature, and make him dependent on the will of the Executive.

The next point is that the President is by the terms of the Constitution to "nominate, and by and with the advice and consent of the Senate appoint," to all offices, and that without this concurrence he appoints to none except when authorized by Congress. And this may be described as the *rule* of the Constitution.

Digitized by Google

The exceptions are:

1. That in the cases of inferior offices the Congress may lodge this power with the President alone or with the courts or the heads of departments; and

2. That in cases of vacancy happening during the recess of the Senate he may—not *appoint*—but *fill them up* by granting commissions to expire at the end of the next session of that body.

From which it appears—

1. That the President cannot, as already stated, in any case, appoint alone without the express authority of Congress, and then only in the case of inferior offices.

2. That the power to supply even an accidental vacancy was only to continue until the Senate was in a condition to be consulted and to advise and act upon the case; and

3. As a corollary from these two propositions, that if the power to remove in cases where the tenure is indefinite be, as it is solemnly conceded by the Supreme Court of the United States *in re* Heenan, (13 Peters,) an incident to the power to appoint, it belongs to the President and Senate, and not to the President alone, as it was held in that case to be in the judge who made the appointment.

The argument upon which this implied and merely inferential power, not of "filling up," but of *making* a vacancy during the recess—which is now claimed to extend to the making of a vacancy at any time—has been defended, is—

First. The possible necessity for the exercise of such a power during the recess of the Senate, or, in other words, the argument *ab inconvenienti*.

Second. That the power of removal is a purely executive function, which, passed by the general grant in the first section of the second article of the Constitution, would have carried the power to appoint, if unprovided for, and is to be considered in him in all cases wherein it has not been expressly denied or lodged in other hands; while the association of the Senate, the same not being an executive body, is an exception to the general principle, and must be taken strictly so as not to extend thereto.

Third. That it is essential to the President, as the responsible *head* of the government, charged by his oath with the execution of the laws, that he should control his own subordinates by making their tenure of office to depend upon his will, so as to make a unit of the administration.

The answer to the *first* of these propositions is that there is no necessity for the exercise of the power during the recess, because the case supposed may be provided for by Congress—as it has been by the act now in question—under its express constitutional authority "to make all laws which shall be necessary or proper for carrying into execution all powers vested in the government or in any department thereof," a power which, by the way, is very strangely claimed by one of the President's counsel to be an implied one.

To the *second* the answer is, that whether an executive power or not depends on the structure of the government, or, in other words, on what the Constitution makes it; that the clause in question is but a distributive one; that if all executive power is in the President, then by parity of reason all legislative power is in Congress without reference to the Constitution; that the Senate is not only associated with the President in the general appointing power, but that the power itself may be withdrawn by Congress almost entirely from both, under the provision in regard to inferior offices, which would involve a repugnancy to the general grant relied on, if the power be an executive one; that if no provision had been made for appointment in the Constitution the power to supply the omission would have resulted to the law-maker under the authority just quoted, to make "all laws that might be necessary or proper for carrying into execution all powers vested in the government or any department thereof," which carries with it the power to create all offices; and that, moreover, this power of removal, in the only case wherein it is referred to, is made a *judicial* one.

To the *third* the answer is—

1. That however natural it may be for the President, after an unchecked career of usurpation for three long years, during which he has used his subordinates generally as the slavish ministers of his will, and dealt with the affairs of this nation as if he had been its master also as well as theirs, he greatly mistakes and magnifies his office, as has been already shown in the fact that under the Constitution he may be stripped at any time by Congress of nearly the whole of the appointing power; and,

2. That the responsibility of the President is to be graduated by, and can be only commensurate with, the power that is assigned to him; that the obligation imposed on him is to take care that the *laws* are faithfully executed, and not his *will*, which is so strangely assumed to be the only law of the exalted functionaries who surround him; and that it is not only *not* essential to the performance of their duty under the law that the heads of departments should be the mere passive instruments of his will, but the very contrary.

Upon this brief statement of the argument it would seem as if there could be no reasonable doubt as to the meaning of the Constitution. But the high delinquent who is now on trial, feeling that he cannot safely rest his case here, and shrinking from the inexorable logic that rules it against him, takes refuge in the past, and claims to have found a new Constitution that suits him better than the old one, in the judicial authorities, in the opinion of the commentators, in the enlightened professional and public sentiment of the nation, and in a legislative practice and construction that are coeval with the government, and have continued without interruption until the present time. A little inquiry, however, will show that here is no altar of sanctuary, no city of refuge there, to shelter the greatest of the nation's malefactors from the just vengeance of a betrayed and indignant people.

And first, as to judicial authority. There are but three cases, I think, wherein these questions have ever come up for adjudication before the Supreme Court of the United States, and in all of them the decisions have been directly in conflict with the theory and pretensions of the President.

The first was the familiar one of Marbury *vs.* Madison, 1 Cranch, 256, made doubly memorable by the fact that it arose out of one of the so-called midnight appointments made by the elder Adams—the same, by the way, whose casting vote as an executive officer turned the scale in favor of the power to which he was destined to succeed in the first Congress of 1789, on the eve of his retirement—under a law which had been approved only the day before, authorizing the appointment of five justices of the peace for the District of Columbia, to serve respectively for the term of five years. The commission in question had been duly signed and registered, but was withheld by his successor (Jefferson) on the ground that the act was incomplete without a delivery. It was not claimed by him that the appointment was revocable, if once consummated. If it had been, the resistance would have been unnecessary, and the assertion of the right to the office an idle one. Chief Justice Marshall, in delivering the opinion of the court, holds this language:

> Where an officer is removable at the will of the Executive, the circumstance which completed his appointment is of no consequence, because the act is at any time revocable. But where the officer is not removable at the will of the Executive, the appointment is not revocable and cannot be annulled. Having once made the appointment, his power over the office is terminated in all cases where by law the officer is not removable by him. Then, as the law creating the office gave the right to hold for five years independent of the Executive, the appointment was not revocable, but vested in the officer legal rights that are protected by the laws of his country.

The point ruled here is precisely the same as that involved in the tenure-of-office act, to wit: that Congress may define the tenure of any office it creates, and that once fixed by law, it is no longer determinable at the will of anybody—the act being a mere substitution of the will of the nation for that of the Execu-

Digitized by Google

tive, by giving that will the form of law, which is, indeed, the only form that is consistently admissible in a government of law. The present Executive insists—as Jefferson did not—that he has the power under the Constitution to remove or suspend at any and all times any executive officer whatever for causes to be judged of by himself alone; and that, in the opinion of his advisers, this power cannot be lawfully restrained; which is in effect to claim the power to *appoint* without the advice and consent of the Senate, as he has just now done, as well as to *remove*.

The next case in order is that of *ex parte* Heenan, reported in 13 Peters, which involved a question as to the right of the judge of the district court of Louisiana to remove, at his discretion, a clerk appointed by him indefinitely under the law. The court say there—Thompson, Justice, delivering the opinion— that—

> All offices, the tenure of which is not fixed by the Constitution or limited by law, must be held either during good behavior or at the will and discretion of some department of the government, and subject to removal at pleasure.

And again that—

> In the absence of all constitutional provisions or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as an incident to the power to appoint.

They add, however—

> *But* it was very early adopted as the *practical* construction that the power was vested in the President alone, and that such would appear to have been the *legislative* construction, because in establishing the three principal Departments of State, War, and Treasury, they recognized the power of removal in the President, although by the act of 1798, establishing the Navy Department, the reference was not by name to him.

The result was that upon the principles thus enunciated, involving the exception as to cases where the tenure was limited by law, as laid down in Marbury *vs.* Madison, they declared the power of removal to have been well exercised by the judge who made the appointment under the law, for the reason only that it was an incident thereto.

It is well worthy of remark, however, in this connection, that although what is thus gratuitously said as to the practical construction in opposition to the rule there recognized does not conflict in any way with the doctrine of Marbury *vs.* Madison, it is entirely at variance, as seems to be confessed, with the decision itself, which, on the doctrine of Mr. Madison in the debate of 1789, that the power of removal was a strictly executive one, and passed by the general grant of the Constitution, unless expressly denied or elsewhere lodged, must have been inevitably the other way, because in that case it must have resulted, not to the judge, but to the President. Whether a mere permissive, *sub silentio* exercise of a power like this, or even a temporary surrender on grounds of personal confidence or party favor, where it perhaps violated no constitutional interdict, and was, in point of fact, authorized as to all but the superior offices, can raise a prescription against a constitutional right, or how many laws it will require to abrogate the fundamental law, I will not stop now to inquire. It is sufficient for my purpose that the case decides that the power of removal is but an incident to the power of appointment, and that, of course, it can be exercised only by the same agencies, as the tenure-of-office act exactly provides.

The next and last case is that of the United States *ex relatione vs.* Guthrie, reported in 17 Howard, 284, which was an application for a *mandamus* to the Secretary of the Treasury to compel him to pay the salary of a territorial judge in Minnesota, who had been removed by the President before the expiration of his term, which was fixed by law at four years. The case was dismissed, upon the doctrine that the proceeding was not a proper one to try the title to an office, and therefore the question of the power to remove was not disposed of or discussed, except by Justice McLean, who dissented on the main point and felt

Digitized by Google

called upon, of course, to pass upon the other. I refer to his opinion mainly for the purpose of borrowing, with a part of the argument, an important statement in relation to the views of the bench that was almost coeval with the Constitution itself on this question. He says, on page 306:

There was great contrariety of opinion in Congress on this power. With the experience we now have in regard to its exercise there is great doubt whether the most enlightened statesman would not come to a different conclusion.

The power referred to was that of the removal by the President of the heads of the principal departments of the government, as conceded by the acts of 1789.

The Attorney General calls this a constitutional power. There is no such power given in the Constitution. It is presumed to be in the President from the power of appointment. This presumption, I think, is unwise and illogical. The reasoning is: The President and Senate appoint to office; therefore the President may remove from office. Now, the argument would be legitimate if the power to remove were inferred to be the same that appoints.

It was supposed that the exercise of this power by the President was necessary for the efficient discharge of executive duties; that to consult the Senate in making removals the same as making appointments would be too tardy for the correction of abuses. By a temporary appointment the public service is now provided for in case of death; and the same provision could be made where immediate removals are necessary. The Senate, when called upon to fill the vacancy, would pass upon the demerits of the late incumbent.

This, I have never doubted, was the true construction of the Constitution; and I am able to say it was the opinion of the late Supreme Court with Marshall at its head.

And again:

If the power to remove from office may be inferred from the power to appoint, both the elements of the appointing power are necessarily included. The Constitution has declared what shall be the executive power to appoint, and, by consequence, the same power should be exercised in a removal.

It will be said, perhaps, that all this is qualified by the remark that "this power of removal has been, perhaps, too long established and exercised to be now questioned." It is enough, however, to refer to the observation which follows, that "the voluntary action of the Senate and the President would be necessary to change the practice," to show what was meant by him. Such events as our eyes have witnessed, and such a conjuncture of affairs following fast upon their heels as would leave the Executive with all his formidable patronage and all the prestige of his place, without even the meagre support of a third in either House, were scarcely within the range of human probability. When he remarks, therefore, that it was "*perhaps* too late to question it," he means, of course, "to question it *successfully*," as the context shows. If he had meant otherwise he would not have referred to a voluntary change of practice as operating a corresponding change of the Constitution. He was too good a lawyer and too large a statesman to affirm that the fundamental law of a great State could be wrested from its true construction either by the errors of the legislature, or the toleration of a mischievous practice and a monster vice for less than eighty years.

It is apparent, then, from all the cases, that the judicial opinion, so far from sustaining the view of the President, settles at least two points which are fatal to his pretensions: First, that Congress may so limit the tenure of an office as to render the incumbent irremovable except by the process of impeachment; and second, that the power to remove, so far as it exists, is but an incident to the power to appoint.

Nor is it any answer to say, as has been claimed in debate on this floor, that these were cases of *inferior* offices where, under the Constitution, it was within the power of Congress to regulate them at its discretion. There is nothing in the provision as to inferior offices to distinguish them from others beyond the mere article of *appointment*. This is a question of *tenure*, and that is equally undefined as to both, except in the few cases specially enumerated therein. It was equally within the power of Congress to regulate in one case as in the other. The right to regulate is a necessary result of the right to create. When it

Digitized by Google

establishes an office, as it has established the departmental bureaus, by law, it has, of necessity, the right to prescribe its duties and say how long it shall be held and when it shall determine. When it does say so, it can hardly be maintained with any show of reason that a power which is only implied from the fact that the tenure of office has been left indefinite in the Constitution, which has vested the establishment of offices in Congress, shall be held to operate to defeat its will and shorten the life of its own creature in cases where its legislation is express.

And so, too, as to the doctrine that the power of removal is but an incident to the power to appoint. That is settled upon grounds of reason, as a general principle, which has no more application to inferior offices than to superior ones. The idea is that the power of removal wherever it exists is in the very nature of things but part and parcel of the power to appoint, and that as a consequence the power that makes, and none other, must unmake; and on this idea it was ruled in the particular case that the power to remove was in the judge, because the authority to appoint was there. It equally rules, however, that where the appointment is in the head of a department the power of removal belongs to him; that where it is lodged by Congress in the President alone it is in him only; and where it is in the President and Senate conjointly there it is in both; which is precisely the doctrine maintained by the minority in the Congress of 1789. It ought to be a sufficient answer, however, that no such distinction was taken by Justice Thompson in the Heenan case, although he referred to the departure from this rule in the practical construction which had assigned the power to the President alone.

The judicial opinion having thus signally failed to support the dangerous heresies of the President, the next resort is to that of the statesmen, lawyers, and publicists who have from time to time illustrated our history. And here, too, it will be found that the great criminal who is at your bar has no better support than he has found in higher quarters.

I am not here to question the doctrine which has been so strongly urged, upon the authority of Lord Coke, that contemporaneous exposition is entitled to great weight in law. Taking it to be sound, however, it will hardly be pretended, I suppose, that there is anything of this description which will compare in value with the authoritative, and, I might almost say, oracular utterances of the Federalist, which was the main agent, under Providence, in securing for the Constitution the support of the people of the several States, and has since occupied the rank of a classic in the political literature of America. And yet, in the seventy-seventh number of that series, which is ascribed to the pen of Alexander Hamilton, himself perhaps "the first among his peers" in the convention which framed that instrument, it is assumed as an unquestionable proposition, and that, too, in the way of answer to the objection of instability arising from frequent changes of administration, that inasmuch "as the Senate was to participate in the business of appointments, its consent would therefore be necessary to displace as well as to appoint." Nor was it considered even necessary to reason out a conclusion that was so obvious and inevitable. It does not seem to have been supposed by anybody that a power so eminently regal could ever be raised in the executive of a limited government out of the mere fact of the silence of the Constitution on that subject and the failure to provide any other mode of removal than by the process of impeachment. If the conclusion, however, was not a sound one, then it was no better than a false pretence, which those at least who concurred in its presentation were morally estopped from controverting. And yet it is to one of the distinguished authors of these papers, in his quality of a legislator, that the nation is mainly indebted for the vote which inaugurated and fastened so long upon it the mischievous and anti-republican doctrine and practice which it has cost a revolution to overthrow. It does not seem, however, to have effected any change in the opinions of the distinguished author, as we find

him insisting in a letter written ten years afterward to James McHenry, then Secretary of War, that even the power to fill vacancies happening during the recess of the Senate is to be confined to "such offices as having been once filled have become vacant by accidental circumstances."

From the time of the settlement of the policy of the government on this subject by its first Congress down till the accession of the younger Adams in 1826, a period of nearly forty years, the question does not seem to have been agitated, for the very satisfactory reason that the patronage was so inconsiderable, and the cases of abuse so rare, as to attract no attention on the part of public men. In the last named year, however, a committee was raised by the Senate, headed by Mr. Benton, and composed of nine of the most eminent statesmen of that day, to consider the subject of restraining this power by legislation. That committee agreed in the opinion that the practice of dismissing from office was a dangerous violation of the Constitution, which had in their view been "*changed* in this regard *by construction* and *legislation*," which were only another name for legislative construction, and reported sundry bills for its correction not unlike in some respects to the present law. Those bills failed of course, but with the public recognition of the new and alarming doctrine which followed the accession of the next administration, that the public offices, like the plunder of a camp, were the legitimate spoils of the victorious party, the subject was revived in 1835 by the appointment of another committee, embracing the great names of Calhoun, Webster, and Benton, for the same object. The result of their labors was the introduction of a bill requiring the President in all cases of removal to state the reasons thereof, which passed the Senate by a vote of 31 to 16, or nearly two-thirds of that body. In the course of the debate on that bill, Mr. Webster, whose unsurpassed, and, as I think, unequalled ability as a constitutional lawyer will be contested by nobody, held this emphatic language:

> After considering the question again and again within the last six years, I am willing to say that, in my deliberate judgment, the original decision was wrong. I cannot but think that those who denied the power in 1789 had the best of the argument. It appears to me, after thorough and repeated and conscientious examination, that an erroneous interpretation was given to the Constitution in this respect by the decision of the first Congress.

And again:

> I have the clearest conviction that they (the Convention) looked to no other mode of displacing an officer than by impeachment or the regular appointment of another person to the same place.

And further:

> I believe it to be within the just power of Congress to reverse the decision of 1789, and I mean to hold myself at liberty to act hereafter upon that question as the safety of the government and of the Constitution may require.

Mr. Calhoun was equally emphatic in his condemnation of the power, and speaks of previous cases of removal as "rather exceptions than constituting a practice."

The like opinion was obviously entertained by both Kent and Story, the two most distinguished of the commentators on the Constitution, and certainly among the highest authorities in the country. The former, after referring to the construction of 1789 as but "a loose, incidental, and declaratory opinion of Congress," is constrained to speak of it as "a striking fact in the constitutional history of our government that a power so transcendent as that which places at the disposal of the President alone the tenure of every executive officer appointed by the President and Senate, should depend on *inference* merely, and should have been gratuitously declared by the first Congress in opposition to the high authority of the Federalist, and supported or acquiesced in by some of those distinguished men who questioned or denied the power of Congress to incorporate a national bank." (1 Kent's Commentaries, sec. 16, p. 308.) The latter speaks of it with equal emphasis as "constituting the most extraordinary case in the history of the government of a power conferred by *implication* in

the Executive by the assent of a bare majority in Congress which has not been questioned on many other occasions." (2 Commentaries, sec. 1543.)

The same opinion, too, is already shown upon the testimony of Judge McLean, as cited above, to have been shared by "the old Supreme Court, with Marshall at its head." It seems, indeed, as though there had been an unbroken current of sentiment from sources such as these through all our history against the existence of this power. If there be any apparently exceptional cases of any note but the equivocal one of Mr. Madison, they will be found to rest only, as I think, upon the legislation of 1789 and the long practice that is supposed to have followed it. I make no account, however, of the opinions of Attorneys General, although I might have quoted that of Mr. Wirt, in 1818, to the effect that it was only when Congress had not undertaken to fix the tenure of the office that the commission could run during the pleasure of the President. They belong to the same category as those of cabinet officers. It may not be amiss, however, to add just here that although this question was elaborately argued by myself upon the introduction of the bill to regulate removals from office in the House of Representatives, which was substantially the same as the present law, which was depending at that time, no voice but one was lifted up in the course of a protracted debate against the constitutionality of the measure itself.

What, then, is there in the legislation of 1789, which is claimed to be not only a contemporary but an authoritative exposition of the meaning of the Constitution, and has no value whatever except as the expression of an opinion as to the policy of making the heads of departments dependent on the President, unless the acts of that small and inexperienced Congress are to be taken as of binding force upon their successors and as a sort of oracular outgiving upon the meaning of the Constitution?

Whatever may have been the material provisions of the several acts passed at that session for the establishment of these departments, it is not to be supposed that it was intended to accomplish a result so clearly not within the province of the law-maker as the binding settlement of the sense of that instrument on so grave a question. The effect of these acts has, I think, been greatly misunderstood by those who rely on them for such a purpose. All that they amount to is the concession to the President, in such a form as was agreeable to his friends, of a power of removal which the majority was disposed to accord to him in cases where the tenure of the officer was left indefinite, and the office was therefore determinable at will, but which those friends declined to accept as a grant, because they claimed it as a right. The result was but a compromise, which evaded the issue by substituting an *implied* grant for an *express* one, and left the question in dispute just where it found it. The record shows, however, that even in this shape the bill finally passed the House by a vote of only 29 to 22. In the Senate, however, where the debate does not appear, it was carried only by the casting vote of the Vice-President, not properly himself a legislative but an *executive* officer, who had a very direct interest in the decision.

The case shows, moreover, as already suggested, that there was no question involved as to the duration of the office. Whether it could be so limited, as has been done in the tenure-of-office law, was not a point in controversy, and is not, of course, decided. That it might be so is not disputed as to the "inferior" offices. The thing itself was done, and the right to do it acquiesced in and affirmed, as shown already in the case of Marbury *vs.* Madison, as early as 1801. It cannot be shown, however, that there is any difference between the cases of *inferior* and *superior* offices in this respect. There is no word in the Constitution to require that the latter shall hold only *at pleasure*. Both are created by law, and Mr. Madison himself admits, in the debate of 1789, that "the legislative power creates the office, defines the power, *limits its duration*, and annexes the compensation." All that the Constitution contains is the exception from the general power of appointment in the authority of Congress

to vest that power in inferior cases in the President alone, in the courts of law, or in the heads of departments. But there is nothing here as to the power of removal—nothing but as to the privilege of dispensing with the Senate in the matter of appointments, and no limitation whatever upon its power over the office itself in the one case more than in the other.

And now let me ask what did the decision amount to, supposing it had even ruled the question at issue, but the act of a mere legislature, with no greater powers than ourselves? Is there anything in the proceedings of the Congress of 1789 to indicate that it ever assumed to itself the prerogative of setting itself up as an interpreter of the fundamental law? The men who composed it understood their functions better than to suppose that it had any jurisdiction over questions of this sort. If it had, so have we, and *judgments* may be reversed on a rehearing, as constitutions cannot be. But if it did exist, whence was it derived? How was the Congress to bind the people by altering the law to which it owed its own existence and all its powers? It could not bind its successors by making even its own enactments irrepealable. If it had a right to give an opinion upon the meaning of the Constitution, why may we not do the same thing? The President obviously assumes that they were both wiser and better than ourselves. If the respect which he professes for their opinions had animated him in regard to the Congresses which have sat under his administration, the nation would have been spared much tribulation and we relieved of the painful necessity of arraigning the Chief Magistrate of the republic at your bar for his crimes against order and liberty, and his open defiance of law.

However it may be with others, I am not one of those who think that all wisdom and virtue have perished with our fathers, or that they were better able to comprehend the import of an instrument with whose practical workings they were unfamiliar than we who are sitting under the light of an experience of eighty years, and suffering from the mistakes which they made in regard to the future. They made none greater than the illusion of supposing that it was impossible for our institutions to throw up to the surface a man like Andrew Johnson; and yet it was this mistake, perhaps no other, that settled the first precedent, which was so likely to be followed, in regard to the mischievous power of removal from office. But if 29 votes in the House at that day, making a meagre majority of only seven, and nine only in a Senate that was equally divided, in the first hours of constitutional life, and with such a President as Washington to fling a rose-colored light over the future of the republic, had even intended to give, and did give, a construction to our great charter of freedom, what is to be said of 133 votes to 37, constituting more than three-fourths of one house, and of 35 to 11, or nearly a like proportion of the other, in the maturity of our strength, with a population of nearly forty millions, and under the light of an experience which has proved that even the short period of eighty years was capable of producing what our progenitors supposed to be impossible, even in the long tract of time?

But there is one other consideration that presents itself just here, and it is this: it does not strike me by any means as clear that there was anything in the act of 1789, aside from any supposed attempt to give it the force of an authoritative exposition of the Constitution, that was necessarily inconsistent with the view of that instrument which I have been endeavoring to maintain. Taking the authority lodged by it with the President as a mere *general grant* of power, there was nothing certainly in its terms to prevent it. So far at least as regarded the *inferior* officers, it resulted from the express authority of Congress to vest the power of *appointment* in the President alone, that they might have even left the power of removal in the same hands also as an incident. And so, too, as to the superior ones. The power to remove in any case was but an implied one. If it was necessary, as claimed, to enable the Executive to perform

his proper functions under the Constitution, instead of raising the power in himself by the illogical inference, that it must belong to him *qua* Executive, it presented one of the very cases for which it is provided expressly that Congress shall "make all laws that shall be necessary and proper for carrying into execution all power vested by the Constitution in the government of the United States, or in any department or officer thereof." To infer in the face of such a provision as this, that any or all powers necessary to either department of the government belong to them, of course, because they are necessary, is a reflection on the understandings of the framers of the Constitution, and is in effect to nullify the provision itself, by enabling the other departments of the government to dispense entirely with the action of the law-maker.

But, admitting the act of 1789 to import, in its full extent, all that it is claimed to have decided, it is further insisted that this untoward precedent has been ripened into unalterable law by a long and uninterrupted practice in conformity with it. If it were even true, as stated, there would be nothing marvellous in the fact that it has been followed up by other legislation of a kindred character. It is not to be doubted that a general opinion did prevail for many years that all the offices of the government not otherwise provided for in the Constitution ought to be held at will, for the obvious reason, among others, that it rendered the process of removal easy by making an impeachment unnecessary. The only question in dispute was in whose hands this power could be most appropriately lodged. It so happened, however, that the first of our Presidents brought with him into the office an elevation of character that placed him above all suspicion, and assured to him a confidence so unbounded that it would have been considered entirely safe to vest him with unlimited command; and it was but natural, as it was certainly highly convenient, that the exercise of that will, which was to determine the life of the officer, should be lodged with him. It was so lodged.

But is there anything remarkable in the fact that the precedent thus set should have been followed up in the practice of the government? It would have been still more remarkable if it had been otherwise. It was a question of patronage and power—of rewarding friends, and punishing enemies. A successful candidate for the Presidency was always sure to bring in with him a majority in the popular branch at least, along with a host of hungry followers flushed with their victory and hungering after the spoils. Was it expected that they should abridge his power to reward his friends, or air their own virtue by self-denying ordinances? That would have been too much for men, and politicians, too. No. Though the wisest statesmen of the country had realized and deplored for forty years at least the giant vice which had been gnawing into the very entrails of the state, and threatened to corrupt it in all its members, there was no remedy left but the intervention of that Providence which has purified the heart of the nation through the blood of its children, and cast down the man who "but yesterday might have stood against the world," so low, that with all his royal patronage there are none left—no, I think not one—"so poor as to do him reverence."

It is not even true, however, that the precedent of the Congress of 1789 has been followed invariably and without interruption since that time. The history of our legislation shows not only repeated instances wherein the tenure of office has been so precisely defined as to take the case entirely out of the control of the Executive, but some in which even the power of removal itself has been substantially exercised by Congress, as one would suppose it might reasonably be, where it creates and may destroy, makes and may unmake, even the subject of controversy itself.

The act of 1801, already referred to in connection with the case of Marbury and Madison, assigning a tenure of five years absolutely to the officer, involves a manifest departure from it.

Digitized by Google

The five several acts of August 14, 1848, March 3, 1849, September, 1850, and May 3, 1854, providing for the appointment of judges in the Territories of Oregon, Minnesota, New Mexico, Kansas, and Nebraska, and fixing their terms of office at four years absolutely, are all within the same category.

The act of 25th February, 1863, followed by that of June 3, 1864, establishing the office of Comptroller of the Currency, defining his term and making him irremovable except by and with the advice and consent of the Senate, and upon reasons to be shown, is another of the same description.

The act of March 3, 1865, which authorizes any military or naval officer who has been dismissed by the authority of the President to demand a trial by court-martial, and in default of its allowance within six months, or of a sentence of dismissal or death, thereby avoids the order of the Executive; and the act of July 13, 1866, which provides that no officer in time of peace shall be dismissed except in pursuance of a sentence of a court-martial, are both examples of like deviation of the strongest kind, for the double reason that the President is, under the Constitution, the commander-in-chief of the army and navy of the United States, and none but *civil* officers are amenable to the process of impeachment, and that the officer dismissed is absolutely restored, awakened into new life, and raised to his feet by the omnipotent fiat of the legislative power.

And, lastly, the act of 15th May, 1820, (3 Statutes, 582,) which dismisses by wholesale a very large and important class of officers at periods specially indicated therein, not only fixed the tenure prospectively, but involves a clear exercise of the power of removal itself on the part of the legislature.

Further developments in the same direction would no doubt reward the diligence of the more painstaking inquirer. That, however, would only be a work of supererogation. Enough have been shown to demonstrate beyond denial that the practice relied on has been anything but uniform.

To establish even a local custom or prescription the element of continuity is as important as that of time. Any break in that continuity by an adverse entry, or even a continual claim, would arrest the flow of a statute of limitations against the rightful owner of a tenement. An interruption of the enjoyment would be equally fatal to a prescription. But are we to be told that a case which in this view would not even be sufficient to establish a composition for tithes, or a trifling easement as between individuals, is sufficient to raise a prescription against a constitutional right or to abrogate the fundamental law of a nation and bar the inappreciable inheritance of its people? The very statement of the proposition would seem to furnish its own refutation.

If the case had even been one of uninterrupted continuity, how is it as to the element of time? To settle a custom, either public or private, it must have the hoar of antiquity upon it; its origin must be traced far back into the night of time, so far that no living memory can measure it, and no man can say that he has drunk at its head-springs or stood beside its cradle. What is the case here? It is a question of the fundamental law of a people whose dominions embrace a continent, and whose numbers are multitudinous as the stars of heaven. A little more than three-quarters of a century will measure the career that they have thus far run. What a mere span is this! Why, I have seen on this floor, a not uninterested spectator of this great drama, a veteran statesman, known to fame, and perhaps personally to all of you, whose years go back behind your Constitution itself. But what is a century but the briefest hour in the life of a state? How is a mere non-user for 75 of its infant years to be set up either to bar a fundamental right, or to prove that it never existed? It required six centuries of struggle with the prerogative to settle the British constitution firmly upon the foundations of Magna Charta, and no hostile precedent of the reigns of either the Plantagenets or Tudors was allowed to stand in the way of the onward movement that culminated in the revolution of 1688. And yet it is gravely urged on us, that the conduct of our national life is to be regulated by the mis-

takes of its childhood, and that the grand patrimony of the Revolution has been squandered beyond recovery by the thoughtless improvidence or too generous and trustful prodigality of an earlier heir who had just come to his estate.

And now I may venture to say, I think, that it has been shown abundantly that all the resources of the President on this point have failed him. The awards of reason, the judgments of the courts, the opinions of statesmen, lawyers, and publicists, the precedent of 1789, and the practice of the government, are all against him.

Mr. MORRILL, of Vermont, (at 4 o'clock and 6 minutes p. m.) I understand that the manager is extremely ill to-day, and would not be able to finish his argument if he were well. I therefore move that the Senate, sitting as a court, adjourn until to-morrow.

The motion was agreed to; and the Senate, sitting for the trial of the impeachment, adjourned until to-morrow at 12 o'clock.

TUESDAY, *April* 28, 1868.

The Chief Justice of the United States took the chair.

The usual proclamation having been made by the Sergeant-at-arms,

The managers of the impeachment on the part of the House of Representatives and the counsel for the respondent, except Mr. Stanbery, appeared and took the seats assigned to them respectively.

The members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

The journal of yesterday's proceedings of the Senate, sitting for the trial of the impeachment, was read.

Mr. SUMNER. Mr. President, I send to the Chair an amendment to the rules of the Senate, sitting for the trial of impeachments. When that has been read, if there be no objection, I will ask that it go over until the close of the arguments, to take its place with the other matters which will come up for consideration at that time.

The CHIEF JUSTICE. The Secretary will read the proposed rule for information.

The chief clerk read as follows:

Whereas it is provided in the Constitution of the United States that on trials of impeachment by the Senate no person shall be convicted without the concurrence of two-thirds of the members present, and the person so convicted shall be removed from office; but this requirement of two-thirds is not extended to any further judgment, which remains subject to the general law that a majority prevails; therefore, in order to remove any doubt thereupon,

Ordered, That after removal, which necessarily follows conviction, any question which may arise with regard to disqualification or any further judgment shall be determined by a majority of the members present.

Mr. DAVIS. I object to the consideration of it.

The CHIEF JUSTICE. The proposed order will lie over. That is the disposition proposed by the senator from Massachusetts. Mr. Manager WILLIAMS will proceed on the part of the House of Representatives.

Mr. Manager WILLIAMS. Mr. President and Senators, I have to thank you for the indulgence which you were kind enough to extend to me yesterday at a time when I very much wanted it. I shall endeavor, however, to testify my gratitude by not abusing it.

Before I closed yesterday I was referring to the position taken by me, and, as I thought, sufficiently demonstrated, that the President had failed in all his supports; that the reason of the thing, the natural reason, the cultivated reason of the law, the judicial sentiment, the opinions of commentators, the precedent

Digitized by Google

of 1789, and even the practice, were all against him; but then I suggested that there was one resource still left, to which I now come, and that is in the opinion of what is sometimes called his *cabinet*, the trusted councillors whom he is pleased to quote as the advisers whom the Constitution and the practice of the government have assigned to him. If all the world has forsaken him, they, at least, are still faithful to the chief whom they have so long accompanied, and so largely comforted and encouraged through all his manifold usurpations.

It is true that these gentlemen have not been allowed to prove, as they would have desired to do, that, maugre all the reasoning of judges, lawyers, and publicists, they were implicitly of opinion, and so advised the President, that the tenure-of-office law, not being in accordance with his will, was, of course, unconstitutional. It may be guessed, I suppose, without damage to our case, that, if allowed, they would have proved it. With large opportunities for information, I have not heard of any occasion wherein they have ever given any opinion to the President except the one that was wanted by him, or known to be agreeable to his will. If there had been time, I should have been glad to hear from some of these functionaries on that question. It would have been pleasant to hear the witness on the stand, at least, discourse of constitutional law. If the public interest has not suffered, the public curiosity has at least been balked by the denial of the high privilege of listening to the luminous expositions which some of these learned Thebans, whose training has been so high as to warrant them in denouncing us all—the legislators of the nation—as no better than "Constitution tinkers," would have been able to help us with.

It is a large part of the defence of the President, as set forth in his voluminous special plea, and elaborated in the argument of the opening counsel, not only that his cabinet agreed with him in his views as to the law, but that if he has erred, it was under the advice received from those whom the law had placed around him. It is not shown, however, and was not attempted to be shown, that in regard to the particular offence for which he is now arraigned before you they were ever consulted by him. But to clear this part of the case of all possible cavil or exception, I feel that it will not be amiss to ask your attention to a few remarks upon the relations of the President with this illegitimate body, this excrescence, this mere fungus, born of decay, which has been compounded in process of time out of the heads of the departments, and has shot up within the last few years into the formidable proportions of a directory for the general government of the state.

The first observation that suggests itself is that this reference to the advice of others proceeds on the hypothesis that the President himself is not responsible, and is therefore at war with the principal theory of the defence, which is that he is the sole responsible head of the executive department, and must, therefore, *ex necessitate*, in order to the performance of his appropriate duties, have the undisputed right to control and govern and remove them at his own mere will, as he has just done in the case of Mr. Stanton—a theory which precludes the idea of advice in the fact that it makes the adviser a slave. What, then, does the President intend? Does he propose to abandon this line of defence? He cannot do it without surrendering his case.

Is it his purpose, then, to divert us from the track by doubling on his pursuers, and leading them off on a false scent, or does he intend the offer of a vicarious sacrifice? Does he think to make mere scapegoats of his councillors by laying all his multitudinous sins upon their backs? Does he propose to enact the part of another Charles, by surrendering another Strafford to the vengeance of the Commons? We must decline to accept the offer. We want no ministerial heads. We do not choose in the pursuit of higher game to stoop to any ignobler quarry either on the land or on the sea. It would be anything but magnanimous in us to take, as it would be base in him to offer, the heads of those whom our own past legislation has degraded into slaves. When Cæsar

Google

falls his councillors will disappear along with him. Perhaps he thinks, however, that *nobody* is responsible. But shall we allow him to justify in one breath the removal of Mr. Stanton on the ground that under the law he was his master, and then in another, when arraigned for this, to say that he is not responsible because he took advice from those who are but mere automata—only his "hands and voice," in the language of his counsel—and no more than the mere creatures of his imperial will? This would be a sad condition, indeed, for the people of a republic claiming to be free. We can all understand the theory of the British constitution. The king can do no wrong. The person of majesty is sacred. But then the irresponsibility of the sovereign is beautifully reconciled with the liberty of the subject, by holding the ministry responsible, and thus taking care that he shall get no bad advice from them. But what is to be our condition, with no recourse between the two, to either king or minister? It will be not unlike what is said in the touching plaint of the Britons, "The barbarians drive us to the sea, and the sea drives us back again on the barbarians."

But who made these men the advisers of the President? Not the Constitution, certainly; not the laws, or they would have made them free. The Constitution has given to him no *advisers* but the Senate, whose opinion he scouts at and defies, because he cannot get from it the advice he wants, and would obtain, no doubt, if it were reduced to the condition of that of imperial Rome. All it provides in regard to the heads of departments is that he may require the opinion in writing of each of them upon any subject relating to the duties of *his own special office*, and no more. He cannot require it as to other matters, and by the strongest implication it was not intended that he should take it on any matter outside of their own respective offices and duties. He has undoubtedly the privilege which belongs to other men, of seeking for advice wherever he may want it; but if he is wise, and would be honestly advised—as he does not apparently wish to be—he will go to those who are in a condition to tell him the truth without the risk of being turned out of office, as Mr. Stanton has been, for doing so. No tyrant who has held the lives of those around him in his hands has ever enjoyed the counsels of any but minions and sycophants. If it had been the purpose of the framers of the Constitution to provide a council for the President, they would have looked to it that he was not to be surrounded with such creatures as these.

But then it is said that the practice of holding cabinet councils was inaugurated by President Washington, and has since continued without interruption. It is unquestionable that he did take the opinions in writing of all the heads of departments, on bills that were submitted to him in the constitutional way, and not unlikely that he may have consulted them as to appointments, and other matters of executive duty that involved anything like discretion. They may have met occasionally in after times upon the special invitation of the President. It was not, however, as I think, until the period of the war, when the responsibilities of the President, as Commander-in-chief of the armies, were so largely magnified as to make it necessary that he should take counsel from day to day, that they crystallized into their present form, as a sort of institution of state; and not till the accession of Andrew Johnson, that they began to do the work of Congress, in a condition of peace, by legislating for the restoration of the rebel States. From that time forward, through all that long and unhappy interregnum of the law-making power, while the telegraph was waiting upon the action of those mysterious councils, that dark tribunal which was erecting States by proclamation, taxing the people, and surrendering up the public property to keep them on their feet, and exercising a dispensing power over the laws, had apparently taken the place of the Congress of the nation, with powers quite as great as any that the true Congress has ever claimed. To say that the acts of this mere cabal, which looked for all the world like some dark conclave of con-

Digitized by Google

spirators plotting against the liberties of the people, were the results of free consultation and comparison of views, is to speak without knowledge. I for one mistrusted them from the beginning, and, if I may be excused the egotism again, it was under the inspiration of the conviction that they could not have held together so long under an imperious, self-willed man like the present Executive, without a thorough submission to all his views, that I was moved to introduce and urge, as I did, through great discouragements, but, thank God, successfully, the amendment to the tenure-of-office bill, that brings about this conflict. It has come sooner than I expected, but not too soon to vindicate, by its timely rescue of the most important of the departments of the government from the grasp of the President, the wisdom of a measure which, if it had been the law at the time of Mr. Johnson's accession, would, in my humble judgment, have set his policy aside and made his resistance to the will of the loyal people, and his project of governing the nation without a Congress, impossible. The veil has been lifted since the passage of this law, and those who wish may now read in letters of living light the great fact that during the progress of all this usurpation that has convulsed the nation, and kept the south in anarchy for three long years, there was scarce a ripple of dissent to ruffle the stagnant surface of those law-making and law-breaking cabals, those mere beds of justice, where, in accordance with the theory of the President himself, there was but one will that reigned undisputed and supreme.

To insist, then, that any apology is to be found for the delinquencies of the President, in the advice of a cabinet, where a difference of opinion was considered treason to the head, and loyalty to the law, instead of to the will of the President, punished by dismissal, is, as it seems to me, on his part, the very climax of effrontery. What adequate cause does the President now assign for the removal of Mr. Stanton? His counsel promised us in their opening that they would exhibit reasons to show that it was impossible to allow him to continue to hold the office. They have failed to do it. They have not even attempted it. Was it because he had failed to perform his duties, or had in any way offended against the law? The President alleges nothing of the kind. Was it even a personal quarrel? Nothing of this sort is pretended either. All that we can hear of is that there was a "want of mutual confidence;" that "his relations to Mr. Stanton were such as to preclude him from resorting to him for *advice*," (Heaven save the mark!) and that he did not think he could be any longer safely responsible for him. His counsel say that Mr. Stanton is a thorn in his side. Well, a thorn in the flesh is sometimes good for the spirit. But so are Grant, and Sherman, and Sheridan, and so is Congress, and so is every loyal man in the country who questions or resists his will. The trouble is, as everybody knows, that Mr. Stanton does not indorse his policy, and cannot be relied on to assist him in obstructing the laws of Congress; and that is just the reason why you want this thorn to "stick," and, if need be, prick and fester a little there, and must maintain it there, if you would be faithful to the nation and to yourselves. You cannot let Mr. Stanton go, by an acquittal of the President, without surrendering into his hands the very last fortress that you still hold, and are now holding only at the point of the bayonet.

But there is a point just here that seems to have been entirely overlooked by the counsel for the President, to which I desire especially to invite your attention. It seems to have been assumed by them throughout—if it is not, indeed, distinctly asserted in the defendant's plea—that if they shall be able to succeed in establishing a power of removal in the President, either under the Constitution or the act of 1789, erecting the department now in question, he may exercise that power at his mere will and pleasure, without reason and without responsibility; and having failed to show any adequate cause, or indeed any cause whatever for the act done here, he stands, of course, on this hypothesis. But is this the law? Is there no such thing as an abuse of power, and a just

responsibility as its attendant? Was it intended in either case—whether the power flowed from one source or from the other—that it should be exercisable without restraint? That doctrine would be proper in a monarchy, perhaps, but it is ill suited to the genius of institutions like our own. Nor was it the opinion of Mr. Madison, or those who voted and acted with him in the Congress of 1789. No man there who asserted the power of removal to be in the President, or concurred in bestowing it on him for the occasion, ever supposed that its exercise was to be a question of mere caprice, or whim, or will. To the objection that this would be the effect of the doctrine of removal, it was answered by Mr. Madison himself in these words:

> The danger consists merely in this, that the President can displace from office a man whose merits require that he should be continued in it. What will be the motive which the President can feel for such abuse of his power, and the restraints that operate to prevent it? In the first place, he will be impeached by the House before the Senate for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust.

And it was no doubt mainly on this argument that the power of removal was embodied in the law.

What, then, have the President and his counsel to say in answer to this? Is the President impeachable on his own case, or does he expect to realize the fruits of the argument, and then repudiate the very grounds on which the alleged construction rests? Was Mr. Stanton a meritorious officer? Did his merits require that he should be continued in the place? No loyal man, I think, disputes that they did, and this Senate has already solemnly adjudged it, in their decision that, upon the reasons stated by the President, there was no sufficient cause for his removal, while none other have been since shown by the accused himself. What, then, was the motive for this act of *maladministration*, as Mr. Madison denominates it? Nothing that we are aware of, except the fact that the President cannot control the War Office in the interests of his policy, so long as he is there. Was this, then, a wanton removal? It was something more—it was a wicked one. And are we to be told now that he is bound to show no reasons, and cannot be compelled to answer for it to the nation, by those who claim the power of removal for him on the very footing that its abuse would be impeachable?

But it is further strenuously argued, that although the law may be constitutional, and the case of Mr. Stanton within it, as it has been already held to be by this Senate, the case was not so clear a one as to authorize a charge of crime against the President, unless it can be shown that he has wilfully misconstrued it; and that although wherever a law is passed through the forms of legislation, it is his duty to see that it is faithfully executed so long as it requires no more than ministerial action on his part, yet, where it is a question of cutting off a power confided to him by the Constitution, and he alone can bring about a judicial decision for its settlement, if, on due deliberation and advice, he should be of the opinion that the law was unconstitutional, it would be no violation of duty to take the needful steps to raise that question, so as to have it peacefully decided.

Allow me to say in answer, that if even ignorance of the law, which excuses nobody else, can be held to excuse the very last man in the nation who ought to be allowed to plead it, the testimony shows, I think, that he did not misunderstand its meaning. His suspension of Mr. Stanton, which was an entirely new procedure, followed, as it was, by his report of the case to the Senate within twenty days after its next meeting, is evidence that he *did* understand the law as comprehending that case, and did not intend to violate it, if he could get rid of the obnoxious officer without resorting to so extreme and hazardous a remedy.

But the question here is not so much whether he ignorantly and innocently mistook the law, as whether in the case referred to of an interference with the

power claimed by him under the Constitution, he may suspend the operation of a law by assuming it to be unconstitutional, and setting it aside until the courts shall have decided that it is a constitutional and valid one. In the case at issue, it was not necessary to violate the law, either by contriving to prevent the incumbent from resuming his place under it, or turning him out by violence after he had been duly reinstated by the Senate, if he honestly desired to test its validity in the judicial forum. All that it was necessary for him to do was to issue his order of removal and give the officer a notice of that order and its object. If he refused to obey, the next and obvious step would have been to direct the Attorney General to sue out a writ of *quo warranto*, on his own relation. This was not his course. The remedy was not summary enough for his uses, as his special counsel, employed only after the arrest of his pseudo Secretary Thomas, testifies, because it would have allowed the law to reign in the meanwhile, instead of creating an interregnum of mere will by which he hoped to supersede it. His project was to seize the place; by craft, if possible; by force, if necessary. For this purpose he claims to have made an arrangement with General Grant for its surrender to himself, in case the judgment of the Senate should restore the officer, and now taxes that distinguished officer with bad faith to him individually for his obedience to the law.

It stands, therefore, upon his own confession, that he intended to prevent Mr. Stanton from resuming his position, in which case, as he well knew, and as his Attorney General knew, and must have informed him, there was no remedy at law for the ejected officer. Foiled and baffled by the integrity of Grant, after full deliberation he issues his order of removal on the 21st of February, and sends it by his lieutenant. Thomas, with a commission to himself to act as Secretary *ad interim*, and enter upon the duties of the office. He does not fail to suggest to him at the same time that Stanton is a coward, and may be easily frightened out of the place with a proper show of energy on his part. He tells him also that he expects him to support the Constitution and the laws—as he understands them, of course. Thomas is a martinet. He knows no law, as he confesses, but the order of his Commander-in-chief. He has been taught no argument but arms; no logic but the dialectics of hard knocks. Instructed by the President, he hopes to frighten Stanton by his big looks and horrent arms. He proceeds upon his warlike errand in all the panoply of a brigadier, and loftily demands the keys of the fortress from the stern warder, who only stipulates for twenty-four hours to remove his camp equipage and baggage. The conquest is apparently an easy one. He reports forthwith to his chief with the brevity of a Cæsar: "*Veni, vidi, vici.*" They rejoice, no doubt, together over the pusillanimity of the Secretary; and the puissant Adjutant then unbends, and flies for relaxation, after his heroic and successful feat, to the delights and mysteries of the masquerade; not, however, until he has "fought his battle o'er again," and invited his friends to be present at the surrender on the following morning, which he advises them that he intends to compel by force, if necessary.

The masquerade opens. "Fair women and brave men" are there, and—

> Music ascends with its voluptuous swell,
> And eyes look love to eyes that speak again;
> And all goes merry as a marriage bell.

The Adjutant himself is there. The epaulette has modestly retired behind the domino. The gentleman from Tennessee at least will excuse me, if, after his own example, I borrow from the celestial armory, on which he draws so copiously, a little of that *light* artillery with which he blazes along his track, like a November midnight sky with all its flaming asteroids. The Adjutant, I repeat, is there.

> Grim-visaged war hath smoothed his wrinkled front,
> And now, instead of mounting barbed steeds

Digitized by Google

To fright the souls of fearful adversaries,
He capers nimbly in a lady's chamber
To the lascivious pleasing of a lute.

But lo! a hand is laid upon his shoulder, which startles him in the midst of the festivities, like the summons to "Brunswick's fated chieftain" at the ball in Brussels, on the night before the battle in which he fell. It is the messenger of the Senate, who comes to warn him that his enterprise is an unlawful one. On the following morning he is waited upon again by another officer, with a warrant for his arrest for threats which looked to a disturbance of the peace. This double warning chills his martial ardor. Visions of impending trouble pass before his eyes. He sees, or thinks he sees, the return of civil strife, the floors of the department dabbled, perhaps, like those of the royal palace at Holyrood, with red spots of blood. But, above all, he feels that the hand of the law-maker and of the law itself, which is stronger than the sword, is on him, and he puts up his weapon and repairs, in peaceful guise, to take possession of his conquest. I do not propose, however, to describe the interview which followed. That will be the task of the dramatist. It will be sufficient for us to accompany him back to the White House, where he receives the order to "Go on and take possession," which he was so unhappily called back to contradict, and which it was then well understood, of course, that he could not obtain except by force; and he continues to be recognized as Secretary of War, without a portfolio or a *cure*, while he waits under the direction of the President, not upon the law, but only to see, like Micawber, what may turn up here, and to be inducted and installed in proper form, as soon as your previous decision shall have been reversed, and his title affirmed, by your votes in favor of an acquittal. The idea of a suit, in which direction no single step was ever taken, is now abandoned, if it was ever seriously entertained.

The conversation, however, with General Sherman, who was called as a witness by the President himself, settles the fact conclusively, if not already demonstrated by all the attendant circumstances, that it was not his purpose at any time to bring the case into the courts for adjudication. He preferred the dexterous finesse, or the strong hand, to a reference which every sensible lawyer would have told him could be attended with only one result, and that a judgment in favor of the law.

But in this great strait, instead of a resort to the Attorney General himself, his special counsel Cox, employed only after the arrest of Thomas, is called to prove that he advised against the writ of *quo warranto*, because of "the law's delay," and endeavored to seek a remedy more summary through a *habeas corpus*, in the event of the commitment of the Secretary *ad interim*. Supposing it all true, however, the movement came too late to help his employer's case, by showing a desire to put the issue in the way of a judicial decision upon the law. Nor is it clear by any means that such a process could have achieved the desired results. With a warrant good upon its face, and charging a threatened disturbance of the peace, or an offence against a statute of the United States, I doubt whether any court would venture to declare the warrant void, or to discharge upon such a hearing, on the footing of the unconstitutionality of the law, which had received nearly three-fourths of the votes of both houses, or, indeed, of any law whatever; while I do not see how even a decision against it could have had either the effect of ousting Stanton or putting Thomas in his place. It is enough, however, for the present purpose that the prisoner was discharged on the motion of his own attorney.

The counsel for the President admits that he cannot in ordinary cases erect himself into a judicial tribunal, and decide that a law is unconstitutional, because the effect would be that there could never be any judicial decision upon it; but insists, as already stated, that where a particular law has cut off a power confided to him by the Constitution, he alone has the power to raise the question for

the courts, and there is no objection to his doing it; and instances the cases of a law to prevent the making of a treaty, or to declare that he shall not exercise the functions of Commander-in-chief.

It has been already very fully answered that there is no evidence here to show that there was any honest purpose whatever to bring this case into the courts, but that, on the contrary, there is very conclusive testimony to prove that he intended to keep it out of them. But had he a right to hold this law a nullity until it was affirmed by another tribunal, whether it was constitutional or not? The Constitution gives to him the power of passing upon the acts of the two houses, by returning a bill with his objections thereto; but if it is afterwards enacted by two-thirds of both, it is provided that "it shall become a law." What is a law? It is a rule of civil conduct prescribed by the supreme power of a state. Is there any higher power than the legislature? Is it essential to the operation of a law that it should have the approval of the judiciary, as well as of the President? It is as obligatory on the President as upon the humblest citizen. Nay, it is, if possible, more so. He is its minister. The Constitution requires that he shall take care that it be faithfully executed. It is for others to controvert it, if aggrieved, in a legal way, but not for him. If they do, however, it is at their peril, as it would be at his, even in the cases put, where it is asked, with great emphasis, whether he would be bound to obey. Those cases are extreme ones. But if hard cases are said to make bad precedents, it may be equally remarked that extreme cases make bad illustrations. They are, moreover, of express powers, as this is not. But it will be time enough to answer them when they arise. It is not a supposable contingency that two-thirds of both houses of Congress will flatly violate their oaths in a clear case. Thus far in their history, they have passed no law, I believe, that has been adjudged invalid. Whenever they shall be prepared to do what is now supposed, constitutions will be useless, faith will have perished among men, and limited representative government become impossible. When it comes to this, we shall have revolution, with bloody conflicts in our streets, with a Congress legislating behind bayonets, and that anarchy prevailing everywhere which is already foreshadowed by the aspect of a department of this great government beleaguered by the minions of despotism, with its head a prisoner, and armed sentinels pacing before its doors Who shall say that the President shall be permitted to disobey even a doubtful law, in the assertion of a power that is only implied? If he may, why not also set aside the obnoxious section of the appropriation bill, upon which he has endeavored unsuccessfully to debauch the officers of the army, by teaching them insubordination to the law? Why not openly disregard your reconstruction acts, as he will assuredly do, if you shall teach him by your verdict here that he can do it with impunity? The legal rule is that the presumption is in every case in favor of the law, and that is a *violent* one, where none has ever been reversed. The President claims that this presumption shall not stand as against him. If it may not here, it cannot elsewhere. To allow this revolutionary pretension, is to dethrone the law and substitute his will. To say that he may hold his office, and disregard the law, is to proclaim either anarchy or despotism. It is but a short step from one extreme to the other. To be without law, and to leave the law dependent on a single will, are in effect but one and the same thing. The man who can declare what is law, and what is not, is already the absolute master of the state.

But who is to try this case? The President insists that it belongs to the jurisdiction of the Supreme Court, where, as he untruly says, he endeavored to carry it. So it would, if the question involved were one of merely private right. But in his eccentric efforts to get into one court, by turning his back upon it, he has stumbled very unexpectedly into another. It is not the one he sought, but it is the one the Constitution has provided for just such delinquencies as his, and he cannot decline its cognizance. I beg pardon. He did send you word, through

the special counsel whom he sends here with his personal protest, that he might have declined it, on the opinion still entertained by both of them, that this is no Congress, and you are no court of competent jurisdiction to bring before you and try a President of the United States, by the logic of which argument he proves equally, of course, that he is no President. To avoid a bloody conflict, however, although he has been tendered the necessary aid in men, and inasmuch, I suppose, as you have been so indulgent as not to put him to the humiliation of appearing in person at your bar, he waives his sufficient plea to the jurisdiction, and condescends, only out of the abundance of his grace, and in a spirit of forbearance, for which he claims due credit at your hands, to make answer before a tribunal which he might rightfully have defied.

But he is here now by attorney, in what his other counsel have taken great pains to prove to you to be a court indeed, although they insist, not very consistently, in almost the same breath, that it has only the functions of a jury. I shall not dispute that question with them. I am willing to agree that the Senate, *pro hac vice*, is a court, and that, too, of exclusive jurisdiction over the subject-matter in dispute, from which it follows by a necessary logic, as I think, that it is fully competent to try and decide the whole case for itself, taking such advice as it thinks proper as to the law, and then rejecting it if it is not satisfactory. If it cannot do this, it is but the shadow and mockery of what the defendant's counsel claim it to be in force and fact. But by what name soever it may be called, it will solve for the President the problem which he has desired to carry into another tribunal, without waiting for any extraneous opinion. It has already determined upon the constitutionality of the tenure-of-office law, by enacting it over his objections, as it has already passed upon its meaning, by its condemnation of the act for which he is now to answer at its bar. It will say, too, if I mistake not, that whether constitutional or not, it will allow no executive officer, and much less the Chief Magistrate of the nation, to assume that it is not so, and set up his own opinion in its place, until its previous and well-considered judgment upon the same opinion has been judicially affirmed.

But does it make any difference whether Mr. Stanton's case is within the tenure-of-office act or not? Had the Executive the power at any time, either during the session or the recess, to create a vacancy to be filled up by an appointment *ad interim*, to continue during his own pleasure; or if he had, could he prolong a vacancy so created beyond the period of six months?

The Constitution provides—and it required such a provision, in view of the general clause which associates the Senate with the President, and makes their advice and consent necessary in all cases of appointment, to authorize it—that he shall have power to fill up all vacancies happening during the recess, by temporary commissions to expire at the end of the next session; and by a necessary implication of course he cannot do it in the same way, or without their advice and consent while the Senate is at hand to afford it. The word *happen*, as used here, imports accident or casualty only, according to the best authorities. If this is the correct interpretation, he cannot, of course, create a vacancy for that purpose during the recess, under the Constitution, although he may claim to do so under the law establishing the department, which places the power of removal in his hands. If he does, however, the case then falls within the constitutional provision, and the vacancy thus created must be filled by a commission to expire at the end of the next session.

He did create a vacancy in this case by the suspension during the recess, which he proceeded to supply by the appointment of General Grant as Secretary of War *ad interim* at his pleasure. And this he now defends, not under the provisions of the tenure-of-office law, which would have authorized it, but which he expressly repudiates, but upon the footing, in the first place, of his constitutional power.

Digitized by Google

Nothing is clearer, however, than the proposition, that there was no authority to do this thing except what is to be found in the act which he repudiates. There are no laws and no precedents, so far as I am advised, to justify or excuse it. If he may suspend indefinitely, and appoint at pleasure a Secretary *ad interim*, he may not only change the terms of the commission, but strip the Senate of all participation in the appointing power.

But then he says, again, that he did this under the authority, also, of the act of 13th February, 1795, for filling temporary vacancies. The tenor of that act is, that in a case of vacancy it shall be lawful for the President, if he deem it necessary, to authorize any person or persons to perform the duties until a successor is appointed or such vacancy is filled; with the proviso, however, that no one vacancy shall be supplied in that manner for a longer term than six months; which proves, of course, that the exigency provided for was only to be a temporary one,

We maintain that this act has been repealed by the more recent one of 13th February, 1863, which confines the choice of the President to the heads of the other departments. It is insisted, however, that while the former covers all cases of vacancy, the latter is confined to some particular instances, not including those of removal, or such as may be brought about by efflux of time, and does not, therefore, operate as a repeal to that extent. Granting this, for the sake of the argument, to be true, how is it to apply to a vacancy occurring during the recess, without a repeal of the constitutional provision which is intended expressly for just such cases? Was it intended to supersede it, and is it to be so interpreted? This will hardly be pretended, if it were even clear that the legislature had such a power. The intent and meaning of the act are so transparent from the context, from the words of tenure, and from the six months' limitation, that it is impossible to mistake them, or even to doubt, that it was designed for merely accidental and transient cases, that were left unprovided for in the Constitution. The President's claim would perpetuate the vacancy by enabling him to refuse to fill it, or to nominate a successor.

If it be even true, however, that he might have appointed General Grant during the recess, under the law of 1795, it is equally clear that he could not continue him in office, or protract the vacancy beyond six months; and yet he insists, in his special plea in answer to the averment of the absence of the condition of vacancy, on the 21st of February, when he appointed General Thomas—which was more than six months after the appointment of General Grant—that there was a continuing vacancy at that time; intending, of course, that the act of the Senate in refusing to approve his suspension, and his resumption of the duties of the office, were to be treated as of no account whatever. From the premises of the President, that the civil-tenure act was invalid on constitutional grounds, and did not, at all events, embrace that case, his inference of a continuing vacancy is undeniable, and his appointment of General Thomas, therefore, entirely unauthorized by the act on which he relies.

But there is more in this aspect of the case than the mere failure of the authority. Taking it that, although he might possibly remove during the recess, he could not suspend and appoint a Secretary *ad interim* except by virtue of the tenure-of-office law, and that it may be well pleaded in his defence, even though he may have insisted that he did not refer to, or follow, or recognize it, I think it cannot be a question among lawyers that all the acts of a public officer are to be conclusively presumed to have been done under the law which authorized them. But then it will be said, as it has been in regard to the proof of changes made in the forms of commissions to make them harmonize with the now disputed law, and of other evidence of a kindred character, that this is only to set up the doctrine of estoppel, which, though not unreasonable, has been so often characterized as odious in the civil courts, against a defendant in a criminal proceeding.

Digitized by Google

I am ready to admit that estoppels are odious because they exclude the truth, but have never supposed that they were so when their effect was only to shut out falsehood. It was not for this purpose, however, in my view at least, that such evidence was offered; but only to contradict the President's assertions by his acts, and to show that when he pleads through his counsel, that if the law was valid he honestly believed the contrary, and that if it embraced the case of Mr. Stanton he innocently mistook its meaning, and did not intend wilfully to misconstrue it, he stated what was not true.

And now, a few words only upon the general question of intent itself, which has been made to figure so largely in this cause, under the shadow of the multiplied averments in regard to it. I do not look upon those averments as at all material; and if not material, they are, as every lawyer knows, but mere surplusage which never vitiates, and it is never necessary to prove. I do not speak as a criminal lawyer, but there is no professional man, I think, who reads these charges, that will not detect in them something more, perhaps by way of abundant caution, than even the technical nicety of the criminal pleader. I do not know that even in the criminal courts, where an act is charged in clear violation of a law forbidding it, and especially if it involve the case of a public officer, that it is any more necessary to allege that he violated the law, with the *intent* to violate it, than to aver that he was not ignorant of the law, which every man is bound to know. The law presumes the intent from the act itself, which is a necessary inference, if the law is to be observed and its infraction punished; and the party committing it is responsible for all the consequences, whether he intended them or not. It makes no difference about the motive, for wherever a statute forbids the doing of a thing, the doing it wilfully, although without any corrupt motive, is indictable. (2 Dwarris, 677; 4 Term Rep., 457.) So when the President is solemnly arraigned to answer here to the charge that he has infringed the Constitution, or disobeyed the commands or violated any of the provisions of the tenure-of-office or any other law, he cannot plead either that he did it ignorantly or by mistake, because ignorance of the law excuses nobody, or that he did it only from the best of motives, and for the purpose of bringing the question of its efficacy, or his obligation to conform to it, to a legal test, even though he could prove the fact, as he has most signally failed to do in the case before you. The motives of men, which are hidden away in their own breasts, cannot generally be scrutinized, or taken into the account, where there is a violation of the law. An old Spanish proverb says that there is a place—not to be named to ears polite—which is "paved with good intentions." If they, or even bad advice can be pleaded hereafter, in excuse for either neglect or violation of duty here, it will be something comfortable to die upon at least, and few tyrants will ever suffer for their crimes. If Andrew Johnson could plead, as he has actually done, in apology for his own dispensation with the test-oath law, or any other feature of his law-defying policy, that his only aim was to conciliate the rebels and faciliate the work of restoration, his great exemplar, whom he has so closely copied—the ill-advised and headstrong James II—might equally have pleaded that he did the very same thing in the interests of universal tolerance. The English monarch forfeited his throne and disinherited his heirs upon that cast. It remains to be seen whether our king is to run out the parallel.

I beg to say, however, in this connection, that I do not by any means admit that a case like this is to be tried or judged by the rigid rules and narrow interpretations of the criminal courts. There is no question here of the life, or liberty, or property of the delinquent; it is a question only of official delinquency, involving, however, the life of a great state, and with it the liberties of a great people. If the defendant is convicted, he forfeits only his official place, and is, perhaps, disqualified from taking upon himself any other, which will be no very severe infliction, I suppose, unless the rebels themselves should

Digitized by Google

be so fortunate as to come once more into the possession of the government, and so weak as to trust a man who had been untrue to those who had honored him so generously before. The accusers here are forty millions of freemen, the accused but one, who claims to be their master; the issue, whether he shall be allowed to defy their will, under the pretext that he can govern them more wisely than their Congress, and to take the sword, and, in effect, the purse of the nation into his own hands.

On such an issue, and before such a tribunal, I should not have hesitated to stand upon the plain, unvarnished, untechnical narration of the facts, leaving the question as to their effect upon the interests of the nation and their bearing upon the fitness of Andrew Johnson to hold the helm of this great state, to be decided by statesmen, instead of turning it over either to the quibbles of the lawyer or the subtleties of the casuist. I have no patience for the disquisitions of the special pleader in a case like this. I take a broader view—one that, I think, is fully sustained by the authorities, and that is, that in cases such as this, the safety of the people, which is the supreme law, is the true rule and the only rule that ought to govern. I do not propose to reargue that question now, because it seems to me something very like a self-evident proposition. If Andrew Johnson, in the performance of the duties of his high office, has so demeaned himself as to show that he is no respecter of the laws; that he defies the will of those who make them, and has encouraged disobedience to their behests; that he has fostered disaffection and discontent throughout the lately revolted States; that he is a standing obstacle to the restoration of the peace and tranquillity of this nation; that he claims and asserts the power of a dictator, by holding one of your great departments in abeyance, and arrogating to himself the absolute and uncontrollable right to remove or suspend at his mere will every executive officer of the government, on the land and on the seas, and to supply their places without your agency; if, for any or all of these reasons, the republic is no longer safe in his hands, then, before heaven and earth, as the conservators of the nation's weal, as the trusted guardians of its most invaluable rights, as the depositaries of the most sacred and exalted trust that has ever been placed in the hands of man, it becomes your high and solemn and imperious duty to see that the republic shall take no detriment, and to speak peace to a disturbed and suffering land, by removing him from the trust he has abused and the office that he has disgraced.

There are other points in this case on which I would have desired to comment if time and strength had been allowed to me for that purpose. It is only within the last few days that I have entertained the hope that the Senate would so far relax its rule as to enable me to obtain what, under the circumstances, is at best but an imperfect hearing, and I have felt it necessary, therefore, to confine myself to the leading arguments connected with the removal of the Secretary of War. I wish it to be understood, however, that I do not underrate the value of such of the articles as I have been obliged to pretermit. There is nothing in the whole case, I think, of graver import to the nation than the means adopted by the President for overthrowing the legislative power by fostering disobedience to its enactments and bringing its accepted organ into disrepute.

To this charge there are three answers. The first is the supposed constitutional right to the use of an unbridled tongue, which knows no difference between licentiousness and liberty. The second the provocation supposed to have been offered in the language used by members of Congress in debate, in what seems to be forgotten to be their constitutional right, which not only protects them from challenge anywhere, but gives to them the right freely to criticise the public conduct of the President, over whom the law has placed them, by making him amenable to them for all his errors, as they are not to him. The third is the harmless jest, in the suggestion of a law to regulate the speech and manners of the President. If his counsel can find food for mirth in such a picture as the evidence

Digitized by Google

has shown, I have no quarrel with their taste. The President may enjoy the joke, perhaps, himself. I do not think he can afford it, but history informs us that Nero fiddled while Rome was burning. Whether he does or not, however, I trust that he will find a *censor morum* here as stern as Cato, in the judicial opinion of this body, that the man who so outrages public decency, either in his public or private character, in the pursuit of an object so treasonable as his, has demonstrated his unfitness longer to hold the high place of a Chief Magistrate of a free, intelligent, and moral people. I take leave of this unpalatable theme by remarking that even the advocate of the people must feel, as a child of the republic himself, while he is compelled to say thus much, that he would rather have turned his back, if it had been possible, on such a spectacle, and thrown a mantle over the nakedness that shames us all.

And now, American senators, representatives, and judges upon this mighty issue—joint heirs yourselves of that great inheritance of liberty that has descended to us all, and has just been ransomed and repurchased by a second baptism of blood—a few words more, and I have done.

If the responsibilities of the lawyer are such as to oppress him with their weight, how immeasurably greater are your own! The House of Representatives has done its duty. The rest is now with you. While I have a trust in that God who went before our hosts, as he did before the armies of Israel, through the fiery trials that led so many of the flower of our youth to distant graves on southern battle-fields, which has never failed me in the darkest hour of the nation's agony, I cannot but realize that he has placed the destinies of this nation in your hands. Your decision here will either fall upon the public heart like a genial sunbeam, or fling a disastrous twilight, full of the gloomiest portents of coming evil, over the land. Say not that I exaggerate the issue or overcolor the picture. This, if it were true, would be but an error of much smaller consequence than the perilous mistake of underrating its importance. It is, indeed, but the catastrophe of the great drama which began three years ago with murder—the denouement of the mortal struggle between the power that makes the law and that which executes it—between the people themselves and the chief of their own servants, who now undertakes to defy their will. What is your verdict to decide? Go to the evidence, to the plea of the President himself, and to the defiant answer that he sends by his Tennessee counsel, and they will give you the true measure of the interests involved. It is not a question only whether or not Andrew Johnson is to be allowed to serve as President of the United States for the remainder of his term. It is the greater question whether you shall hold so long yourselves the power that the Constitution gives you by surrendering the higher one to him of suspending, dismissing, and appointing at his will and pleasure every executive officer in the government from the highest to the lowest without your consent, and if possible the still higher one of disregarding your laws for the purpose of putting those laws on trial before they can be recognized. He has made this issue with you voluntarily and defiantly. If you acquit him upon it, you affirm all his imperial pretensions, and decide that no amount of usurpation will ever bring a Chief Magistrate to justice, because you will have laid down at his feet your own high dignity, along with your double function of legislators and advisers, which will be followed of course by that of your other, I will not say greater, office as judges. It will be a victory over you and us which will stir the heart of rebeldom with joy, while your dead soldiers will turn uneasily in their graves; a victory to be celebrated by the exultant ascent of Andrew Johnson to the Capitol, like the conqueror in a Roman triumph, dragging not captive kings, but a captive Senate at his chariot wheels, and to be crowned by his re-entry into the possession of that department of the government over which this great battle has been fought. It is shown in evidence that he has already intimated that he would wait on your action here for that purpose. But is this all? Hug not to your

bosoms, I entreat you, the fond illusion that it is all to end there. It is but the beginning of the end. If his pretensions are sustained, the next head that will fall as a propitiatory offering to the conquered South, will be that of the great chief who humbled the pride of the chivalry by beating down its serried battalions in the field, and dragging its traitor standard in the dust; to be followed by the return of the rebel office-holders, and a general convulsion of the state which shall cast loose your reconstruction laws, and deliver over the whole theatre of past disturbances to anarchy and ruin. Is this an exaggerated picture? Look to the history of the past and judge.

And now, let me ask you, in conclusion, to turn your eyes but for a moment to the other side of the question, and see what are to be the consequences of a conviction—of such a verdict as, I think, the loyal people of this nation, with one united voice, demand at your hands. Do you shrink from the consequences? Are your minds disturbed by visions of impending trouble? The nation has already, within a few short years, been called to mourn the loss of a great Chief Magistrate, through the bloody catastrophe by which a rebel hand has been, unfortunately, enabled to lift this man into his place, and the jar has not been felt as the mighty machine of state, freighted with all the hopes of humanity, moved onward in its high career. This nation is too great to be affected seriously by the loss of any one man. Are your hearts softened by the touching appeals of the defendant's counsel, who say to you that you are asked to punish this man only for his divine mercy, his exalted charity to others? Mercy to whom? To the murdered Dostie and his fellows, to the loyal men whose carcasses were piled in carts like those of swine, with the gore dripping from the wheels, in that holocaust of blood, that carnival of murder which was enacted at New Orleans? To those who perished in that second St. Bartholomew at Memphis, where the streets were reddened with the lurid light of burning dwellings, and the loyal occupants, who would have escaped, were cast back into the flames? The divine mercy itself is seasoned by justice, and waits only on contrition. This is no place for such emotions. If it be, it is but mercy to loyalty and innocence that cries aloud for the removal of this bold, bad man. If it be, remember that while your loyal brethren are falling from day to day in southern cities by the assassin's knife, and the reports of the Freedmen's Bureau are replete with horrors at which the very cheek turns pale, your judgment here stains no scaffold with the blood of the victim. No lictor waits at your doors to execute your stern decree. It is but the crown that falls, while none but the historian stands by to gibbet the delinquent for the ages that are to come. No wail of woe will disturb your slumbers, unless it comes up from the disaffected and disappointed South, which will have lost the foremost of its friends. Your act will be a spectacle and an example to the nations, that will eclipse even the triumph of your arms, in the vindication of the public justice in the sublimer and more peaceful triumph of the law. The eyes of an expectant people are upon you. You have but to do your duty, and the patriot will realize that the good genius of the nation, the angel of our deliverance, is still about us and around us, as in the darkest hour of the nation's trial.

Mr. JOHNSON. Mr. Chief Justice, I move that the Senate take a recess for fifteen minutes.

The motion was agreed to; and at the expiration of the recess the Chief Justice resumed the chair and called the Senate to order.

Mr. Manager BUTLER. I ask leave of the President and senators to make a short narration of facts, rendered necessary by what fell from Mr. Nelson, of counsel for the President, in his speech on Friday last, which will be found in vol. 2, pages 144, 145, and 146 of the record.

The CHIEF JUSTICE. If there be no objection the honorable manager will proceed.

Mr. Manager BUTLER. This narration is, as I say, rendered necessary by

what was said by Mr. Nelson, of counsel for the President, in his argument on Friday last, contained in vol. 2, pages 144, 145, and 146 of the record, in relation to Hon J. S. Black, and the supposed connection of some of the managers and members of the House with him in regard to the island of Alta Vela. This explanation becomes necessary because of the very anomalous course taken by the learned counsel in introducing in his argument what he calls a "statement of facts," not one of which would have been competent if offered in evidence, and upon which he founds an attack upon a gentleman not present, and from which he deduces insinuations injurious to some of the managers and other gentlemen, members of the House of Representatives, who are not parties to the issue here, and who have no opportunity to be heard.

The learned counsel was strenuous in argument to prove that this was a court, and its proceedings were to be such only as are had in judicial tribunals. He therefore ought to have constrained himself, at least, to act in accordance with his theory. The veriest tyro in the law in the most benighted portion of the southern country ought to know that in no court, however rude or humble, would an attack be allowed upon the absent or counsel engaged in a cause upon a statement of pretended facts, unsupported by oath, unsifted by cross-examination, and which those to be affected by them had no opportunity either to verify or dispute.

After extracting the details of a document sent by his client to the Senate, the counsel proceeds in relation to a dispute concerning the island of Alta Vela:

According to the best information I can obtain I state that *on the 9th of March*, 1868, General Benjamin F. Butler addressed a letter to J. W. Shaffer, in which he stated that he was "clearly of opinion that, under the claim of the United States, its citizens have the exclusive right to take guano there," and that he had never been able to understand why the Executive did not long since assert the rights of the government and sustain the rightful claims of its citizens to the possession of the island *in the most forcible manner* consistent with the dignity and honor of the nation.

This letter was concurred in and approved of by John A. Logan, J. A. Garfield, W. H. Koontz, J. K. Moorhead, Thaddeus Stevens, J. G. Blaine, and John A. Bingham, on the same day, 9th March, 1868.

The letter expressing the opinion of Generals Butler, Logan, and Garfield was placed in the hands of the President by Chauncey F. Black, who, on the 16th of March, 1868, addressed a letter to him in which he enclosed a copy of the same with the concurrence of Thaddeus Stevens, John A. Bingham, J. G. Blaine, J. K. Moorhead, and William H. Koontz.

After the date of this letter, and while Judge Black was the counsel of the respondent in this cause, he had an interview with the President, in which he urged immediate action on his part and the sending an armed vessel to take possession of the island; and because the President refused to do so, Judge Black, on the 19th March, 1868, declined to appear further as his counsel in this case.

Such are the facts in regard to the withdrawal of Judge Black, according to the best information I can obtain. So far as the President is concerned, "the head and front of his offending hath this extent—no more."

It is not necessary to my purpose that I should censure Judge Black or make any reflection upon or imputation against any of the honorable managers.

The island of Alta Vela, or the claim for damages, is said to amount in value to more than a million dollars, and it is quite likely that an extensive speculation is on foot. I have no reason to charge that any of the managers are engaged in it, and presume that the letters were signed, as such communications are often signed by members of Congress, through the importunity of friends.

Judge Black, no doubt, thought it was his duty to other clients to press this claim; but how did the President view it? * * * * * * *

There are two or three facts to which I desire to call the attention of the Senate and the country in connection with these recommendations. They are, first, that they were all gotten up after this impeachment proceeding was commenced against the President of the United States. Keep the dates in mind, and you will see that such is the fact. Every one of them was gotten up after this impeachment proceeding was commenced against him.

It cannot fail to be evident, that while the counsel disclaims any imputation either upon Judge Black or the managers in words, he so states what he claims to be the facts as to convey the very imputation disclaimed. Therefore it is that I have felt called upon to notice the insinuating calumny.

Digitized by Google

My personal knowledge of matters connected with the island of Alta Vela is very limited.

Some time in the summer of 1867, being in waiting on other business in the office of the Attorney General, Mr. Stanbery, I was present at an argument by Judge Black in behalf of the American citizens claiming an interest in that island. I there, for the first time, learned the facts agreed and in dispute concerning it by listening to and incidentally taking a part, on being appealed to, in the discussion. In February last my attention was next drawn to the matter of the spoliation and imprisonment of American citizens upon the island of Alta Vela by an inquiry of a personal friend, Colonel Shaffer, if I had any acquaintance with the question, and if so, would give him my opinion as a lawyer upon the merits of the controversy. To serve a friend simply, upon recollection of the discussion with the Attorney General, I gave him such "opinion," the rough draught of which I hold in my hand, which is without date, and which, being copied, I signed and placed in his hands. This I believe to have been in the early part of February; certainly before the act was committed by Andrew Johnson which brought on his impeachment. From that time until I saw my "opinion" published in the New York Herald, purporting to come from President Johnson, I never saw it or communicated with either of the gentlemen whose names appear in the counsel's statement attached thereto in any manner, directly or indirectly, in regard to it or the subject-matter of it, or the island of Alta Vela, or the claims of any person arising out of it or because of it. Thus far I am able to speak of my own knowledge.

Since the statement of the counsel "according to the best information he can obtain," I have made inquiry, and from the best information I can obtain find the facts to be as follows: that soon after the "opinion" was signed Colonel Shaffer asked Hon. John A Logan to examine the same question, presented him his brief of the facts, and asked him if he could concur in the opinion, which, after examination, Mr. Logan consented to do, and signed the original paper signed by myself. I may here remark that the recollection of General Logan and Colonel Shaffer concur with my own as to the time of these transactions. I have learned and believe that my "opinion" with the signature of General Logan attached was placed in the hands of Chauncey F. Black, esq., and by him handed to the President of the United States with other papers in the case. Mr. Black made a copy of my "opinion," and afterward at his convenience procured a member of Congress, a personal friend of his, one of the signers, to get the names of other members of Congress, two of whom happened to be managers of the impeachment. This was done by a separate application to each, without any concert of action whatever, or knowledge or belief that the paper was to be used in any way or for any purpose other than the expression of their opinions upon the subject-matter. This copy of my "opinion," when so signed, was a very considerable time after the original given to the President. I desire further to declare that I have no knowledge of or interest, directly or indirectly, in any claim whatever arising in any manner out of the island of Alta Vela other than as above stated.

In justice to the other gentlemen who signed the copy of the paper, I desire to annex hereto the affidavits of Chauncey F. Black, esq., and Colonel J. W. Shaffer, showing that neither of the gentlemen signing the paper had any interest or concern in the subject-matter thereof other than as above set forth.

While I acquit the learned counsel of any intentional falsity of statement, as he makes it to his "best information," which must have been obtained from Andrew Johnson, yet the statement contains every element of falsehood, being both the *suppressio veri* and the *suggestio falsi*, in that it says that on the 9th of March General Benjamin F. Butler addressed a letter to J. W. Shaffer, and that "this letter was concurred in and approved of by John A. Logan, J. A. Garfield, W. H. Koontz, J. K. Moorhead, Thaddeus Stevens, J. G. Blaine, and John A.

Digitized by Google

Bingham on the same day, 9th March, 1868," when the President knew that the names of the five last-mentioned gentlemen were procured on a copy of the letter long after the original was in his hands.

Again, there is another deliberate falsehood in the thrice reiterated statement that these signatures were procured and sent to him for the purpose of intimidating him into doing an act after he was impeached, the propriety and legality of which was contrary to his judgment, when, in truth and in fact, the signatures were procured and sent to him in order, as he averred, to sustain him in doing what he himself declared was just and legal in the premises, and which he intended to do.

The use made of these papers is characteristic of Andrew Johnson, who usually raises issues of veracity with both friend and foe with whom he comes in contact:

I, Chauncey F. Black, attorney and counsellor-at-law, do depose and say that the law firm of Black, Lamont & Co., have been counsel for years on behalf of Patterson & Murguiondo, to recover their rights in the guano discovered by them in the island of Alta Vela, of which they had been deprived by force, and the imprisonment of their agents by some of the inhabitants of Dominica. As such counsel, we have argued the cause to the Secretary of State, and also to the President, before whom the question has been pending since July 19, 1867.

We have in various forms pressed the matter upon his attention, and he has expressed himself fully and freely satisfied with the justice of the claims of our clients and his conviction of his own duty to afford the desired relief, but had declined to act because of the opposition of the Secretary of State. General J. W. Shaffer having become associated with us in the case and having learned that General Butler had become acquainted with the merits of the case, procured his legal opinion upon it, and also a concurrence by General Logan. After receiving this opinion I enclosed it to the President. The time when this opinion was received, and whether it was dated, I do not recollect. The time that it was presented to the President by me can be established by the date of my letter enclosing it. Learning from a mutual friend that it would be desirable for the President to receive the recommendations of other members of Congress, I carried a copy of the opinion to the House of Representatives and procured the signatures of some of my personal friends and asked them to procure the signatures of others which were attached to the copy. Some considerable time after I had forwarded the original I sent this copy so signed to the President. These signatures were procured upon personal application to the gentlemen severally, without any concert of action whatever on their part, and without any reference to any proceedings then pending in the then present action of Congress in regard to the President whatever.

From my relation to the case of Alta Vela I have knowledge of all the rights and interest in it, or in relation to it, so that I am certain that neither of the gentlemen who signed the paper or copy have any interest in the claim or matter in dispute, or in any part thereof, or arising therefrom in any manner, directly or indirectly, or contingently, and that all averment to the contrary from any source whatever is untrue in fact.

CHAUNCEY F. BLACK.

Sworn and subscribed to before me, this 28th day of April, A. D. 1868.
[SEAL.] N. CALLAN, *Notary Public.*

To the best of my knowledge and belief the facts contained in the above affidavit are true in every particular.

J. W. SHAFFER.

Sworn and subscribed before me, this 28th day of April, A. D. 1868.
[SEAL.] N. CALLAN, *Notary Public.*

With this simple statement of the facts, Mr. President and senators, I am content to leave the question of the history of Alta Vela.

Mr. NELSON. Mr. Chief Justice and Senators, as you have heard the statement of the honorable manager, I trust you will permit me to make such reply as I deem fitting and appropriate to the present occasion. The honorable gentleman speaks—

The CHIEF JUSTICE. The counsel can proceed by unanimous consent. If there be no objection he will proceed.

Mr. NELSON. Of course I will not presume to proceed without leave of the Chief Justice and the Senate. I inferred from their silence that the Senate were willing to hear me.

The honorable gentleman speaks as to what he supposes to be the knowledge

Digitized by Google

and the duty of a tyro in the law, and animadverts with some severity upon the introduction of this foreign subject by him in the course of the investigation. I beg leave to remind the honorable senators that, so far as I am concerned, I did not introduce the topic without having, as I believed, just cause and just reason to do it; and whatever may be the gentleman's view in regard to a tyro in the legal profession, I beg leave to say to him, and to this Senate, that I never have seen the day in my life, not from the earliest moment when my license was signed down to the present time, when a client of mine was assailed, and assailed as I believed unjustly, that I did not feel it the very highest professional duty I owed upon the face of the earth to vindicate and defend him against the assault. My views may be, and probably are, different from those of the honorable gentleman and from the views of others. Without casting any censure upon my associates, I will say that if the duty had devolved on me to lead and conduct the investigation in this case, as it did not devolve, but upon those of longer and higher standing in the profession than myself, I would have met the gentleman on every occasion when he made his assaults upon the President of the United States, and I would have answered them from time to time as those charges were made; and I would not have permitted one of his insinuations to go unanswered, so far as an answer could be furnished on our side. When the honorable manager—I am not alluding to the one who has just addressed the Senate, but to the honorable manager who closed the argument so far as it has progressed [Mr. Boutwell]—addressed the Senate on the other side, and saw fit to draw in dark and gloomy colors a picture of the President of the United States, and of the influence he has over his cabinet, and when he saw fit to represent them as serfs obedient to the control of their master, and to make allusion to the withdrawal of Judge Black, I deemed that a fitting and proper occasion, and so consider it still upon the most calm and mature reflection, for me, as one of the counsel for the President, to meet and answer it, and nail it to the counter, as I think I have done successfully.

You all know—and if need be I can hunt up the newspapers and can furnish the testimony—that when Judge Black retired from the President's cause it was published and proclaimed in newspapers hostile to the President that Judge Black, seeing that the case of the President was a desperate case, had withdrawn from it in disgust; and the very highest professional duty that can animate counsel under the heavens devolved on me when this imputation was contained in the address of the honorable manager and alluded to in the connection in which it was, to vindicate the President of the United States against the public aspersions which had been made upon him. It was for that reason, and no other, that I spoke of it, not with any desire to make an assault upon the managers.

While I treated them with civility, while I treated them with kindness, and, as I think, with very great forbearance, the honorable gentleman to-day has made imputations upon me which I hurl back with indignation and with scorn—undeserved imputations. I treated the gentlemen on the other side with courtesy and with kindness. He has rewarded me with insult and with outrage in the presence of the American Senate. It will be for you, senators, to judge whose demeanor is most proper before you, that of the honorable gentleman who foully and falsely charges me with insinuating calumny, or my course in vindicating the President of the United States in the discharge of my professional duty here. So far as any question that the gentleman desires to make of a personal character with me is concerned, this is not the place to make it. Let him make it elsewhere if he desires to do it.

Mr. YATES. Mr. President, I rise to call the counsellor to order.

Mr. NELSON. Mr. Chief Justice and Senators, I will endeavor to comply with the suggestion of the senator. I do not wish to make use of any language improper in this tribunal, but I hope that senators will pardon me for repelling

the strong remarks made by the gentleman on the other side. But let it pass. What I desire to say to you, senators—and that is much more important than anything else—is this: when I made the statement which I did to the Senate, I made it with a full knowledge, as I believed, of what I was doing. It may be possible, senators, that I may have committed an error as to the date of the paper which was signed by Messrs. Logan and the other managers. My recollection is that that paper is without date, and I took it for granted that it was signed on the same day, the 9th of March, that was mentioned by the honorable gentleman; but that is an immaterial error, if it be one. I had the letters in my possession on the day I addressed you, and if the gentleman had seen fit to deny any statement contained in those letters upon that day I had them here ready to read to the Senate. I had no knowledge that this subject would be called up to-day until the honorable gentleman told me during your adjournment of a few minutes. Since that notification I have sent for the letters. I was fearful, however, that they would not be here in time for me to read them now; but if it becomes necessary I shall ask the leave of the Senate to read those letters to-morrow before my associate shall resume his argument in the case. I shall have them, and as this topic is introduced by the honorable gentleman, and introduced, too, in terms of censure of me, I shall ask the honorable Senate to allow me to read those letters.

What is the point? If there be any point in connection with this matter, what is it, and why did I introduce the matter here at all in vindication of the President of the United States against the imputation that was made about Judge Black? Why did I refer to the letters at all? It was for the purpose of showing, in answer to the honorable manager, Mr. Boutwell, this great fact in explanation of the conduct with Judge Black, that the President of the United States had been placed in a dilemma such as no man under accusation had ever been placed in before—for the purpose of showing that, so far as that correspondence is concerned, it was a correspondence which arose after the articles of impeachment had been agreed upon, and probably after they had been preferred to the Senate. It was for that purpose that I introduced the correspondence. It has excited, awakened, and aroused the attention of this whole nation that the counsel for the President of the United States should abandon his cause, and that the true secret of that abandonment has not grown out of any insult the President of the United States rendered to the counsel, out of any injury which he did to them, but has grown out of the fact that a claim was pressed to the island referred to under the circumstances stated. Now, I will go further than I did the other day, and I will answer for it here and anywhere else; I believe that Judge Black acted improperly, under those circumstances, in withdrawing his services from the President of the United States, according to the best lights I have on the subject. Here is this accusation presented against him, and here is this astonishing claim presented to him, signed by four of the managers of this impeachment, presented at this extraordinary period of time, presented when this impeachment was hanging over him; and I maintain still that I had the right, and that it was my solemn and bounden duty, to vindicate him against the charge that was preferred.

Mr. Manager BUTLER. Does the gentleman know what he is saying? "A claim signed by four of the managers?"

Mr. NELSON. I meant to say letter. If I said "claim," I meant to say there was an indorsement. I am glad the gentleman has corrected me. What I mean to say, senators—I may have used some word I did not intend to use—the idea that I intend to convey is that a letter was in the first instance signed by the honorable manager, General Butler; that there was an indorsement of that letter by three other members of the House of Representatives who are managers in this case; that this letter and the indorsement of it had relation to the Alta Vela claim; that the subject was brought up to the consideration of the

President of the United States pending this impeachment, and that whether the letter indorsing General Butler's letter was signed on the 9th of March or at a later period is wholly immaterial. It was signed after this impeachment proceeding was commenced, and Judge Black endeavored to get the attention of the President to the claim and to have him decide upon it, as I am informed and believe, though I have no written evidence of that fact; Judge Black urged it upon him after this impeachment proceeding commenced and after Judge Black had met some of the other counsel and myself in the council chamber of the President. I was not present at that time, but I have it, I may say, from the lips of the President himself, and I believe it to be true, that Judge Black urged upon him a decision of this claim, and that his answer, among others, was that he did not think it a proper time for him to act on the claim, because the Congress of the United States was in session, and that if it was right and proper for a vessel to be sent down there, or any act of public hostility to take place, the President of the United States answered Judge Black, as I am informed and believe, by telling him that Congress was in session, and by asking him to call upon Congress to pass any law that might be necessary for that purpose, and that it was not proper for him to interfere in it. This is all——

Mr. GRIMES rose.

Mr. NELSON. I will relieve the gentleman by stating that I have said as much as I desired to say. I will ask permission, when I receive those letters, in some form to put them before the Senate, and with this remark I will take my seat.

Mr. Manager BUTLER. I trust not until they are shown not to have been mutilated.

Mr. NELSON. Sir!

Mr. Manager LOGAN rose.

Mr. EDMUNDS. Mr. President, I ask that the argument in the cause may proceed. This matter has nothing to do with any question before us.

The CHIEF JUSTICE. The argument on behalf of the President will proceed.

Mr. CAMERON. Mr. President, I trust the manager from Illinois will be allowed to be heard.

Mr. Manager LOGAN. Mr. President, if there is no objection I merely desire to say——

The CHIEF JUSTICE. The honorable manager can proceed, if there be no objection.

Mr. Manager LOGAN. Just a moment. I merely wish to correct the gentleman from Tennessee, the counsel for the respondent, by saying that he is mistaken about this letter having been signed after the impeachment commenced by either General Butler or myself. I know well when I signed it, and the gentleman will find the correction, if he will examine thoroughly, and will certainly be kind enough to make it. I signed the letter long before there was anything thought of impeachment.

Mr. NELSON. If you will let me do so, I will say with great pleasure that I had no design to misrepresent any gentleman concerned in the cause; and in order that the matter may be decided I will have the letter brought here. I may have fallen into an error about the date, but my understanding was that it was after the impeachment proceedings were commenced; but to obviate all difficulty I will produce the letter itself, no matter whether it shows I am mistaken or not. If it shows that I am mistaken I will bring it here in fairness to the Senate; and if it shows that I am right I will bring it again in fairness to the Senate. That is all the gentleman can ask, I am sure. I may possibly be mistaken.

Several SENATORS. Let the argument proceed.

The CHIEF JUSTICE. The argument on the part of the President will proceed.

Digitized by Google

WILLIAM M. EVARTS, esq., of counsel for the respondent, addressed the Senate as follows:

I am sure, Mr. Chief Justice and Senators, that no man of a thoughtful and considerate temper would wish to take any part in the solemn transaction which proceeds to-day unless held to it by some quite perfect obligation of duty. Even if we were at liberty to confine our solicitudes within the horizon of politics; even if the interests of the country and of the party in power, and if duty to the country and duty to the party in power, (as is sometimes the case, and as public men so easily persuade themselves is, or may be, the case in any juncture,) were commensurate and equivalent, who will provide a chart and compass for the wide, uncertain sea that lies before us in the immediate future? Who shall determine the currents that shall flow from the event of this stupendous political controversy; who measure their force; and who assume to control the storms that it may breed?

But if we enlarge the scope of our responsibility and of our vision, and take in the great subjects that have been constantly pressing upon our minds, who is there so sagacious in human affairs, who so confident of his sagacity, who so circumspect in treading among grave responsibilities and so assured of his circumspection, who so bold in his forecast of the future, and so approved in his prescience, as to see, and to see clearly, through this day's business?

Let us be sure, then, that no man should be here as a volunteer or lift a little finger to jostle the struggle and contest between the great forces of our government, of which we are witnesses, in which we take part, and which we, in our several vocations, are to assist in determining.

Of the absolute and complete obligation which convenes the Chief Justice of the United States and its senators in this court for the trial of this impeachment, and of its authentic commission from the Constitution, there can be no doubt. So, too, of the deputed authority of these honorable managers, and their presence in obedience to it, and the attendance of the House of Representatives itself in aid of their argument and their appeal, there is as little doubt. The President of the United States is here, in submission to the same Constitution, in obedience to it, and in the duty which he owes by the obligation he has assumed to preserve, protect, and defend it. The right of the President to appear by counsel of his choice makes it as clearly proper, under the obligations of a liberal profession, and under the duty of a citizen of a free state of sworn fidelity to the Constitution and the laws, that we should attend upon his defence; for though no distinct vocation and no particular devotion to the more established forms of public service hovers our presence, yet no man can be familiar with the course of the struggles of law, of government, of liberty in the world, not to know that the defence of the accused becomes the trial of the Constitution and the protection of the public safety.

It is neither by a careless nor capricious distribution of the most authentic service to the state that Cicero divides it among those who manage political candidacies, among those who defend the accused, and among those who in the Senate determined the grave issues of war and peace and all the business of the state; for it is in facts and instances that the people are taught their Constitution and their laws, and it is by fact and on instances that their laws and their Constitutions are upheld and improved. Constitutions are framed; laws established; institutions built up; the processes of society go on until at length by some opposing, some competing, some contending forces in the state, an individual is brought into the point of collision, and the clouds surcharged with the great forces of the public welfare burst over his head. It is then that he who defends the accused, in the language of Cicero, and in our own recognition of the pregnant instances of English and American history, is held to a distinct public service.

As, then, duty has brought us all here to this august procedure and has

Digitized by Google

assigned to each of us his part in it, so through all its responsibilities and to the end we must surrender ourselves to its guidance. Thus following, our footsteps shall never falter or be misled; and leaning upon its staff, no man need fear that it will break or pierce his side.

The service of the constitutional procedure of impeachment in our brief history as a nation has really touched none of the grave interests that are involved in the present trial. Discarding the first occasion in which it was moved, being against a member of the Senate, as coming to nothing important, political or judicial, unless to determine that a member of this body was not an officer of the United States; and the next trial, wherein the accusation against Judge Pickering partook of no qualities except of personal delinquency or misfortune, and whose result gives us nothing to be proud of, and to constitutional law gives no precedent except that an insane man may be convicted of crime by a party vote; and the last trial of Judge Humphreys, where there was no defence, and where the matters of accusation were so plain and the guilt so clear that it was understood to be, by accused, accusers, and court, but a mere formality, and we have trials, doubtless of interest, of Judge Chase and of Judge Peck. Neither of these ever went for a moment beyond the gravity of an important and solemn accusation of men holding dignified, valuable, eminent, public judicial trusts; and their determination in favor of the accused left nothing to be illustrated by their trials except that even when the matter in imputation and under investigation is wholly of personal fault and misconduct in office, politics will force itself into the tribunal.

But what do we behold here? Why, Mr. Chief Justice and Senators, all the political power of the United States of America is here. The House of Representatives is here as accuser; the President of the United States is here as the accused; and the Senate of the United States is here as the court to try him, presided over by the Chief Justice, under the special constitutional duty attributed to him. These powers of our government are here, this our government is here, not for a pageant or a ceremony; not for concord of action in any of the duties assigned to the government in the conduct of the affairs of the nation, but here in the struggle and contest as to whether one of them shall be made to bow by virtue of constitutional authority confided to the others, and this branch of the political power of the United States shall prove his master. Crime and violence have placed all portions of our political government at some disadvantage. The crime and violence of the rebellion have deprived this House of Representatives and this Senate of the full attendance of members that might make up the body under the Constitution of the United States, when it shall have been fully re-established over the whole country. The crime and violence of assassination have placed the executive office in the last stage of its maintenance under mere constitutional authority. There is no constitutional elected successor of the President of the United States, taking his power under the terms of the Constitution and by the authority of the suffrage; and you have now before you the matter to which I shall call your attention, not intending to anticipate here the discussion of constitutional views and doctrines, but simply the result upon the government of the country which may flow from your determination of this cause under the peculiar circumstances in which, for the first time, too, in the history of the government, a true political trial takes place.

If you shall acquit the President of the United States from this accusation all things will be as they were before. The House of Representatives will retire to discharge their usual duties in legislation, and you will remain to act with them in those duties and to divide with the President of the United States the other associated duties of an executive character which the Constitution attributes to you. The President of the United States, too, dismissed from your presence uncondemned, will occupy through the constitutional term his place of authority, and however ill the course of politics may go, or however

Digitized by Google

well, the government and its Constitution will have received no shock. But if the President shall be condemned, and if by authority under the Constitution necessarily to be exerted upon such condemnation, he shall be removed from office, there will be no President of the United States; for that name and title is accorded by the Constitution to no man who has not received the suffrages of the people for the primary or the alternative elevation to that place. A new thing will have occurred to us; the duties of the office will have been annexed to some other office, will be discharged *virtute officii* and by the tenure which belongs to the first office. Under the legislation of the country early adopted, and a great puzzle to the Congress, that designation belongs to this Senate itself to determine, by an officer of its own gaining, the right under the legislation of 1792 to add to his office conferred by the Senate the performance of the duties of President of the United States, the two offices running along. Whatever there may be of novelty, whatever of disturbance, in the course of public affairs thus to arise from a novel situation, is involved in the termination of this cause; and therefore there is directly proposed to you, as a necessary result from one determination of this cause, this novelty in our Constitution: a great nation whose whole frame of government, whose whole scheme and theory of politics rest upon the suffrage of the people, will be without a President, and the office sequestered will be discharged by a member of the body whose judgment has sequestered it.

I need not attract your attention, long since called to it, doubtless, in your own reflections, more familiar than I am with the routine, to what will follow in the exercise of those duties; and you will see at once that the situation, from circumstances for which no man is responsible, is such as to bring into the gravest possible consequences the act that you are to perform. If the President of the United States, elected by the people, and having standing behind him the second officer of the people's choice, were under trial, no such disturbance or confusion of constitutional duties, and no such shock upon the feelings and traditions of the people, would be effected; but, as I have said, crime and violence, for which none of the agents of the government are responsible, have brought us into this situation of solicitude and of difficulty.

It will be seen, then, that as this trial brings the legislative power of the government confronted with the executive authority, and its result is to deprive the nation of a President and to vest the office in the Senate, it is indeed the trial of the Constitution; over the head and in the person of the Chief Magistrate who fills the great office the forces of this contest are gathered, and this is the trial of the Constitution; and neither the dignity of the great office which he holds, nor any personal interest that may be felt in one so high in station, nor the great name and force of these accusers, the House of Representatives, speaking for "all the people of the United States," nor the august composition of this tribunal, which brings together the Chief Justice of the great court of the country and the senators who have States for their constituents, which recalls to us in the mere etiquette of our address the combined splendors of Roman and of English jurisprudence and power—not even this spectacle forms any important part in the watchful solicitude with which the people of this country are gazing upon this procedure. The sober, thoughtful people of this country, never fond of pageants when pageants are the proper thing, never attending to pageants when they cover real issues and interests, are thinking of far other things than these.

Mr. Chief Justice, it is but a few weeks since the great tribunal in which you habitually preside, and where the law speaks with authority for the whole nation, adjourned. Embracing, as it does, the great province of international law, the great responsibility of adjusting between State and general government the conflicting interests and passions belonging to our composite system, and with determining the limits between the co-ordinate branches of the gov-

Digitized by Google

ernment, there is one other duty assigned to it in which the people of the country feel a nearer and a deeper interest. It is as the guardian of the bill of rights of the Constitution, as the watchful protector of the liberties of the people against the encroachments of law and government, that the people of the United States look to the Supreme Court with the greatest attention and with the greatest affection. That court having before it a subject touching the liberty of the citizen finds the hamstring of its endeavor and its energy to interpose the power of the Constitution in the protection of the Constitution cut by the sharp edge of a congressional enactment, and in its breast carries away from the judgment-seat the Constitution and the law, to be determined, if ever, at some future time and under some happier circumstances.

Now, in regard to this matter, the people of the United States give grave attention. They exercise their supervision of the conduct of all their agents, of whom, in any form and in any capacity and in any majesty, they have not yet learned to be afraid. The people of this country have had nothing in their experience of the last six years to make them fear anybody's oppression, anybody's encroachments, anybody's assaults, anybody's violence, anybody's war. Masters of this country, and masters of every agent and agency in it, they bow to nothing but the Constitution, and they honor every public servant that bows to the Constitution. And at the same time, by the action of the same Congress, the people see the President of the United States brought as a criminal to your bar, accused by one branch of Congress, to be tried by the other, his office, as I have said, to be put in commission and an election ordered. He greatly mistakes who supposes that the people of the United States look upon the office of President, the great name and power that represents them in their collective capacity, in their united power, in their combined interests, with less attachment than upon any other of the departments of this government. The President is, in the apprehension and in the custom of the people of the United States, the magistrate, the authority for whom they have that homage and that respect which belong to the elective office. His oath of office is as familiar to the people of this country as it is to you, for they heard it during the perils of the war from lips that they revered, and they have seen its immense power under the resources of this Constitution of theirs, and supported by their fidelity to maintain the contest of this government against all comers to sustain the Constitution and the law.

It has been spoken of here as if the President's oath were simply an oath to discharge faithfully the duties of his office, and as if the principal duty of the office was to execute the laws of Congress. Why, that is not the President's oath; that portion of it is the common oath of everybody in authority to discharge the duties of his office; but the peculiar oath of the President, the oath of the Constitution, is in the larger portion of it which makes him the sworn preserver, protector, and defender of the Constitution itself; and that is an office and that is an oath which the people of the United States have intrusted and exacted to and from no other public servant but the President of the United States. And when they conferred that power and exacted that duty they understood its tremendous responsibilities, the tremendous oppositions it might encounter, and they understood their duty implied in the suffrage that had conferred the authority and exacted the obligation to maintain him in it—to maintain him in it as against foreign aggression, as against domestic violence, as against encroachments from whatever quarter, under the guise of congressional or whatever authority, upon the true vigor of the Constitution of the United States.

President Lincoln's solemn declaration, upon which he gained strength for himself and by which he gave strength to the people, "I have a solemn vow registered in heaven that I will preserve, protect, and defend the Constitution of the United States," carried him, and carried the people following him, through the struggles, the dangers, the vicissitudes of the rebellion; and that vow, as

Digitized by Google

a legend, now adorns the halls of legislation in more than one State of the Union. This oath of the President, this duty of the President, the people of this country do not in the least regard as personal to him; but it is an oath and a duty assumed and to be performed as their representative, in their interest, and for their honor; and they have determined, and they will adhere to their determination, that the oath shall not be taken in vain, for that little phrase, "to the best of my ability," which is the modest form in which the personal obligation is assumed, means, when conferred upon the ability of the President, the ability of the country; and most magnificently did the people pour out its resources in aid of that oath of President Lincoln; and so when the shock comes, not in the form of violence, of war, of rebellion, but of a struggle between the forces of the government in regard to constitutional authority, the people of the United States regard the President as then bound to the special fidelity of watching that all the departments of this government obey the Constitution, as well as that he obeys it himself.

They give him no assumption of authority beyond the laws and the Constitution, but all the authority and all the resources of the laws and the Constitution are open to him, and they will see to it that the President of the United States, whoever he may be, in regard to the office and its duty, shall not take this oath in vain if they have the power to maintain him in its performance. That indeed the Constitution is above him, as it is above all of the servants of the people, as it is above the people themselves until their sovereignty shall choose to change it, they do not doubt. And thus all their servants, President and Congress and whatever authority, are watched by the people of the United States in regard to obedience to the Constitution.

And not disputing the regularity, the complete authenticity, and the adequate authority of this entire procedure, from accusation through trial and down to sentence, the people yet claim the right to see and to know that it is duty to the Constitution observed and felt throughout that brings the result, whatever it may be. Thus satisfied, they adhere to the Constitution, but they do not purpose to change it. They are converts of no theories of congressional omnipotence. They understand none of the nonsense of the Constitution being superior to the law except that the law must be obeyed and the Constitution not. They know their government, and they mean to maintain it; and when they hear that this tremendous enginery of impeachment and trial and threatened conviction or sentence, if the law and the facts will justify it, has been brought into play, that this power which has lain in the Constitution, like a sword in its sheath, is now drawn, they wish to know what the crime is that the President is accused of. They understand that treason and bribery are great offences, and that a ruler guilty of them should be brought into question and deposed. They are ready to believe that, following the law of that enumeration, there may be other great crimes and misdemeanors touching the conduct of government and the welfare of the state that may equally fall within the jurisdiction and the duty. But they wish to know what the crimes are. They wish to know whether the President has betrayed our liberties or our possessions to a foreign state. They wish to know whether he has delivered up a fortress or surrendered a fleet. They wish to know whether he has made merchandise of the public trust and turned authority to private gain. And when informed that none of these things are charged, imputed, or even declaimed about, they yet seek further information and are told that he has removed a member of his cabinet.

The people of this country are familiar with the removal of members of cabinets and all persons in authority. That on its mere statement does not strike them as a grave offence needing the interposition of this special jurisdiction. Removal from office is not with the people of this country, especially those engaged in politics, a terror or a disagreeable subject; indeed it may be said

Digitized by Google

that it maintains a great part of the political forces of this country; that removal from office is a thing in the Constitution, in the habit of its administration. I remember to have heard it said that an old lady once summed up an earnest defence of a stern dogma of Calvinism, that if you took away her "total depravity" you took away her religion, [laughter,] and there are a great many people in this country that if you take away removal from office you take away all their politics. So that, on that mere statement, it does not strike them as either an unprecedented occurrence or as one involving any great danger to the state.

"Well, but how comes it to be a crime?" they inquire. Why, Congress passed a law for the first time in the history of the government undertaking to control by law this matter of removal from office; and they provided that if the President should violate it it should be a misdemeanor, and a high misdemeanor; and now he has removed, or undertaken to remove, a member of his cabinet, and he is to be removed himself for that cause. He undertook to make an *ad interim* Secretary of War, and you are to have made for you an *ad interim* President in consequence!

That is the situation. "Was the Secretary of War removed?" they inquire. No; he was not removed, he is still Secretary, still in possession of the department. Was force used? Was violence meditated, prepared, attempted, applied? No; it was all on paper, and all went no further than making the official attitude out of which a judgment of the Supreme Court could be got. And here the Congress intercepting again and in reference to this great office, this great authority of the government instead of the liberty of the private citizen, recourse to the Supreme Court, has interposed the procedure of trial and impeachment of the President to settle by its own authority this question between it and the Executive. The people see and the people feel that under this attitude of Congress there seems to be a claim of right and an exercise of what is supposed to be a duty, to prevent the Supreme Court of the United States interposing its serene judgment in the collisions of government and of laws upon either the framework of the government or upon the condition and liberty of the citizen. And they are not slow to understand without the aid of the very lucid and very brave arguments of these honorable managers, that it is a question between the omnipotence of Congress and the supremacy of the Constitution of the United States; and that is an issue on which the people have no doubt, and from the beginning of their liberties they have had a clear notion that tyranny was as likely to be exercised by a Parliament or a Congress as by anybody else.

The honorable managers have attracted our notice to the principles and the motives of the American Revolution as having shown a determination to throw off the tyranny of a king, and they have told us that that people will not bend its neck to the usurpations of a President. That people will not bend its neck to the usurpations of anybody. But the people of the United States know that their fathers went to war against the tyranny of Parliament, claiming to be good subjects of the king and ready to recognize his authority, preserving their own legislative independence, and against the tyranny of Parliament they rebelled; and, as a necessity finally of securing liberty against Parliament, severed their connection with the mother country; and if any honorable member of either house will trace the working of the ideas in the convention that framed the Constitution of the United States, he will discover that inordinate power which should grow up to tyranny in the Congress was more feared, more watched, more provided against than any other extravagance that the workings of our government might be supposed possible to lead to.

Our people, then, are unwilling that our government should be changed; they are unwilling that the date of our Constitution's supremacy should be fixed, and that any department of this government should grow too strong or claim to

Digitized by Google

be too strong for the restraints of the Constitution. If men are wise they will attain to what was sagacious, and if obeyed in England might have saved great political shocks, and which is true for our obedience and for the adoption of our people now as it was then. Said Lord Bacon to Buckingham, the arbitrary minister of James I:

> As far as it may lie in you, let no arbitrary power be intruded; the people of this kingdom love the laws thereof, and nothing will oblige them more than a confidence of the free enjoyment of them; what the nobles upon an occasion once said in Parliament, "*Nolumus leges Angliæ mutari*," is imprinted in the hearts of all the people. (1 Bacon's Works, p. 712.)

And in the hearts of all the people of this country the supremacy of the Constitution and obedience to it are imprinted, and whatever progress new ideas of parliamentary government instead of executive authority dependent upon the direct suffrage to the people may have been made with theorists or with statesmen, they have made no advance whatever in the hearts or in the heads of the people of this country.

I know that there are a good many persons who believe that a written constitution for this country, as for any other nation, is only for a nascent state and not for one that has acquired the pith and vigor of manhood. I know that it is spoken of as the swathing bands that may support and strengthen the puny limbs of infancy, but shame and encumber the maturity of vigor. This I know, and in either house I imagine sentiments of that kind have been heard during the debates of the last two Congresses; but that is not the feeling or the judgment of the people; and this in their eyes, in the eyes of foreign nations, in the eyes of the enlightened opinion of mankind, is the trial of the Constitution, not merely in that inferior sense of the determination whether its powers accorded to one branch or other of the government have this or that scope and impression and force, but whether a government of a written constitution can maintain itself in the forces prescribed and attributed by the fundamental law, or whether the immense passions and interests of a wealthy and powerful and populous nation will force asunder all the bonds of the Constitution, and in the struggle of strength and weight the natural forces, uncurbed by the supreme reason of the state, will determine the success of one and the subjection of the other.

Now, senators, let us see to it that in this trial and this controversy we understand what is at stake and what is to be determined. Let us see to it that we play our part as it should be played and under the motives and for the interests that should control statesmen and judges. If, indeed, this, our closely cinctured liberty, is at last to loosen her zone, and her stern monitor, law, debauched and drunken with this new wine of opinion that is crushed daily from ten thousand presses throughout this land, is to withdraw its guardianship, let us be counted with those who with averted eye and reverent step backward seek to veil this shameless revelry, and not with those who exult and cheer at its excesses. Let us so act as that what we do and what we purpose and what we wish shall be to build up the state, to give new stability to the forces of the government, to cure the rash passions of the people, so that it may be said of each one of us, *ad rempublicam firmandam et ad stabiliendas vires et sanandum populum omnis ejus purgebat institutio.*

Thus acting, thus supported, doubt not the result shall be in accord with these high aspirations, these noble impulses, these exalted duties; and whether or no the forces of this government shall feel the shock of this special jurisdiction in obedience to law, to evidence, to justice, to duty, then you will have built up the government, amplified its authority, and taught the people renewed homage to authority.

And now, this brings me, Mr. Chief Justice and Senators, to an inquiry asked very early in this cause with emphasis and discussed with force, with learning, and with persistence, and that is, is this a court? I must confess that I have heard defendants arguing that they were *coram non judice* before somebody that

was not a judge, but I never heard till now of a plaintiff or a prosecutor coming in and arguing that there was not any court, and that his case was *coram non judice*. Nobody is wiser than the intrepid manager who assumed the first assault upon this court, and he knew that the only way he could prevent his cause from being turned out of court was to turn the court out of his cause, [laughter;] and if the expedient succeeds his wisdom will be justified by the result, and yet it would be a novelty. It is said:

> There is no word in the Constitution which gives the slightest coloring to the idea that this is a court, except that in this particular case the Chief Justice must preside.

So that the Chief Justice's gown is the only shred or patch of justice that there is within these halls; and it is only accidentally that that is here, owing to the peculiar character of the inculpated defendant.

> This is a Senate to hold an inquest of office upon Andrew Johnson.

And I suppose, therefore, to find a verdict of "office found." Certainly, it is sought for. I have not observed in your rule that each senator is to rise in his place and say "office found," or "office not found." Probably every senator does not expect to find it. Your rules, your Constitution, your habit, your etiquette call it a court, assume that there is some procedure here of a judicial nature; and we found out finally on our side of this controversy that it was so much of a court at least that we could not put a leading question in it; and that is about the extreme exercise of the authority of a court in regard to the conduct of procedure that we lawyers habitually discover.

The Constitution, as has been pointed out to you, makes this a court; it makes its proceeding a trial; it assigns a judgment; it accords a power of punishment to its procedure; and it provides that a jury in all judicial proceedings of a criminal character shall be necessary except in this court and on this form of procedure. We may assume, then, that so far as words go, it is a court and nothing but a court.

But it is a question, the honorable manager says, "of substance, and not of form." He concedes that if it be a court you must find upon the evidence something to make out the guilt of the offender to secure a judgment, and he argues against its being a court, not from any nice criticism of words or form, but, as he expresses it, for the substance. He has instructed you, by many references, and by an interesting and learned brief appended to his opening speech, in English precedents and authority to show that it is almost anything but a court; and perhaps during the hundreds of years in which the instrument of impeachment was used as a political engine, if you look only to the judgment and the reasons of the judgment, you would not think it was really a very judicial proceeding; but that through all the English history it was a proceeding in court, controlled by the rules of the court as a court, cannot be doubted.

Indeed, as we all know, though the learned manager has not insisted upon it, the presence of the trial under the peculiar procedure and jurisdiction of impeachment in the House of Lords was but a part of the general jurisdiction of the House of Lords as the great court of the kingdom in all matters civil and criminal, and one of the favorite titles of the lords of Parliament in those earlier days was "judges of Parliament;" and now the House of Lords in England is the supreme court of that country as distinctly as our great tribunal of that name is of this country.

But one page of pretty sound authority, I take it, will put to flight all these dreamy, misty notions about a law and procedure of Parliament in this country and in this tribunal that is to supersede the Constitution and the laws of our country, when I show you what Lord Chancellor Thurlow thought of that subject as prevalent or expected to prevail in England. In Hastings's trial, Lord Loughborough having endeavored to demonstrate that the ordinary rules of proceeding in criminal cases did not apply to parliamentary impeachments,

Digitized by Google

which could not be shackled by the forms observed in the courts below, Lord Thurlow said:

My lords, with respect to the laws and usage of Parliament, I utterly disclaim all knowledge of such laws. It has no existence. True it is, in times of despotism and popular fury, when to impeach an individual was to crush him by the strong hand of power, of tumult, or of violence, the laws and usage of Parliament were quoted in order to justify the most iniquitous or atrocious acts. But in these days of light and constitutional government, I trust that no man will be tried except by the laws of the land, a system admirably calculated to protect innocence and to punish crime."

And after showing that in all the state trials under the Stuart reigns, and even down to that of Sachaverel, in every instance were to be found the strongest marks of tyranny, injustice, and oppression, Lord Thurlow continued:

I trust your lordships will not depart from recognized, established laws of the land. The Commons may impeach, your lordships are to try the cause; and the same rules of evidence, the same legal forms which obtain in the courts below, will, I am confident, be observed in this assembly. (Wraxall's Memoirs, p. 275.)

But the learned manager did not tell us what this was if it was not a court. It is true he said it was a Senate, but that conveys no idea. It is not a Senate conducting legislative business; it is not a Senate acting upon executive business; it is not a Senate acting in caucus on political affairs; and the question remains, if it is not a court what is it? If this is not an altar of justice which we stand about, if we are not all ministers here of justice, to feed its sacred flame, what is the altar and what do we do here about it? It is an altar of sacrifice if it is not an altar of justice; and to what divinity is this altar erected? What but the divinity of party hate and party rage, a divinity to which we may ascribe the Greek character given of envy, that it is at once the worst and the justest divinity, for it dwarfs and withers its worshippers. That, then, is the altar that you are to minister about, and that, the savage demon you are to exalt here in displacing justice.

Our learned managers, representing the House of Representatives, do not seem to have been at all at pains to conceal the party spirit and the party hate which displayed itself in the haste, in the record, and in the maintenance of this impeachment. To show you what progress may make in the course of thirty years in the true ideas of the Constitution, and of the nature of impeachments, let me read to you what the managers of the impeachment of Judge Peck had to say in his behalf. And a pretty solid body of managers they were, too: Judge Ambrose Spencer, of New York; Mr. Henry R. Storrs, of New York; Mr. McDuffie, of South Carolina; Mr. Buchanan, of Pennsylvania, and Mr. Wickliffe, of Kentucky. Ambrose Spencer, as stern a politician as he was an upright judge, opened the case, and had a word to say on the subject of party spirit and party hate. Let me ask your attention to it:

There is, however, one cheering and consolatory reflection. The House of Representatives, after a patient and full examination, came to the resolution to impeach Judge Peck by a very large majority; and the record will show an absence of all party feeling. Could I believe that that baleful influence had mingled itself with and predominated in that vote, no earthly consideration could have prevailed on me to appear here as one of the prosecutors of this impeachment. I have not language to express the abhorrence of my soul at the indulgence of such unhallowed feelings on such a solemn procedure. (Peck's Trial, p. 289.)

Mr. Manager Butler talked to you many hours. Did he say anything wiser, or juster, or safer for the republic than that? Judge Spencer knew what it was to be a judge and to be a politician. For twenty years while he was on the bench of New York, the great judicial light in the common-law jurisdiction of that State, he was a head and leader of a political party, vehement and earnest and unflinching in support of its measures and in the conduct of its discipline; and yet no lawyer, no suitor, no critic ever ventured to say, or to think, or to feel that Judge Spencer on the bench was a politician or carried any trait or trace of party feeling or interest there. Judge Spencer was a politician in the

House of Representatives then; but Judge Spencer in the management of an impeachment could only say that if party feeling mingled in it he would have nothing to do with it, for his soul abhorred it in relation to so solemn a procedure. Yes, indeed, this divinity of party hate, when it possess a man, throws him now into the fire and now into the water, and he is unsuitable to be a judge until he can come again clothed and in his right mind to hear the evidence and administer the law.

But to come down to the words of our English history and experience, if this is not a court it is a scaffold, and an honorable manager yesterday told you so, that each one of you brandished now a headsman's axe to execute vengeance, you having tried the offender on the night of the 21st of February already. I would not introduce these bold words that should make this a scaffold, in the eyes of the people of this country, and you headsmen brandishing your axes, but the honorable manager has done so, and have no difficulty in saying to you that if you are not a court, then you are that which he described and nothing else. If it be true that on the night of the 21st of February, upon a crime committed by the President at midday of that date and on an impeachment moving already forward to this chamber from the House of Representatives, you did hold a court and did condemn, then you are here standing about the scaffold of execution, and the part that you are to play is only that which was assigned you by the honorable manager, Mr. Stevens, and he warned you, held by fealty to your own judgments, not to blench at the sight of the blood.

Now, to what end is this prodigious effort to expel from this tribunal all ideas of court and of justice? What is it but a bold, reckless, rash, and foolish avowal that if it be a court, there is no cause here that, upon judicial reason, upon judicial scrutiny, upon judicial weighing and balancing of fact and of law, can result in a judgment which the impeaching party here, the managers and House of Representatives, demand and constitutionally may demand to be done by this court? At last, to what end are the wisdom, and the courage, the civil prudence and the knowledge of history which our fathers brought to the framing of the Constitution; of what service this wise, this honest frown in the Constitution upon *ex post facto* laws and bills of attainder? What is a bill of attainder; what is a bill of pains and penalties in the experience and in the learning of English jurisprudence and parliamentary history? It is a proceeding by the legislature, as a legislature, to enact crime, sentence, punishment, all in one. And certainly there is no alternative for you; if you do not sit here under law to examine evidence, to be impartial, and to regard it as a question of personal guilt to be followed by personal punishment and personal consequences upon the alleged delinquent, then you are enacting a bill of pains and penalties upon the simple form that a majority of the House and two-thirds of the Senate must concur, and the Constitution and the wisdom of our ancestors all pass for nought.

Our ancestors were brave and wise, but they were not indifferent to the dangers that attended this tribunal. They had no resource in the Constitution where they could so well fix this necessary duty in a free government to hold all its servants amenable to public justice for the public service except to devolve it upon this Senate; but let me show you within the brief compass of the debate, and the only material debate, in the Journal of the Convention that framed the Constitution, how the fears and the doubts predominated:

Mr. Madison objected to a trial of the President by the Senate, especially as he was to be impeached by the other branch of the legislature; and for any act which might be called a misdemeanor. The President, under these circumstances, was made improperly dependent. He would prefer the Supreme Court for the trial of impeachments; or, rather, a tribunal of which that should form a part.

Mr. Gouverneur Morris thought no other tribunal than the Senate could be trusted. The Supreme Court were too few in numbers, and might be warped or corrupted. He was against a dependence of the Executive on the legislature, considering the legislative tyranny the

Digitized by Google

great danger to be apprehended; but there could be no danger that the Senate would say untruly, on their oaths, that the President was guilty of crimes or facts, especially as in four years he can be turned out.

That was Gouverneur Morris's wisdom as to the extent to which the Senate might be trusted under the sanctions and obligations of judicial oaths; but—

Mr. Pinckney disapproved of making the Senate the court of impeachments, as rendering the President too dependent on the legislature. If he opposes a favorite law the two houses will combine against him, and, under the influence of heat and faction, throw him out of office. (5 Madison Papers, p. 528.)

There is the sum and substance of the wisdom that our ancestors could bring to the subject of whether this was to be or could be a court. It is undoubtedly a very great burden and a very exhaustive test upon a political body to turn it into a court for the trial of an executive official in ordinary circumstances. I shall hereafter point out to you the very peculiar, the very comprehensive and oppressive concurrence and combination of circumstances as bearing on this trial that require of you to brace yourselves upon all the virtue that belongs to you and to hold on to this oath for the Divine aid that may support you under this most extraordinary test of human conduct to which our Constitution subjects you to-day. Now, what could the Constitution do for us? A few little words, and that is all—truth, justice, oath, duty. And what does the whole scope of our moral nature and the whole support we may hope from a higher aid extend to in any of the affairs of life but these? Truth, justice, oath, duty control the fate, life, liberty, character, and property of every citizen. Truth, justice, oath, duty are the ideas that the Constitution has forced upon your souls to-day. You receive them or you neglect them; whichever way you turn you cannot be the same men afterward that you were before. Accepted, embraced, obeyed, you are nobler and stronger and better. Spurned, rejected, you are worse and baser and weaker and wickeder than before. And it is thus that by strong ideas a free government must always be held to the path of duty and to the maintenance of its own authority and to the prevalence of its own strength for its perpetual existence.

They are little words, but they have great power. Truth is to the moral world what gravitation is to the material; it is the principle upon which it is established and coheres; and justice in the adaptation of truth to the affairs of men is in human life what the mechanism of the heavens is to the principle that sustains the forces of the globe. Duty is acceptance, obedience to these ideas, and this once gained secures the operation which was intended. When, then, you bend submissive to this oath, that faith among men which, as Burke says, "holds the moral elements of the world together," and that faith in God which binds that world to His throne, subdue you to the service of truth and justice; and the ever-living guardian of human rights and interests does not neglect what is essential to the preservation of the human race and its advancement. The purity of the family and the sanctity of justice have ever been cared for, and will ever be cared for. The furies of the Greek mythology had charge of the sanctions of an oath. The imaginations of the prophets of the world have sanctioned the solemnity of an oath, and peopled the place of punishment with oath-breakers; and all the tortures and torments of history are applied to public servants who, in betrayal of sworn trust, have disobeyed those high, those necessitous obligations without which the whole fabric of society falls in pieces.

I do not know why or how it is that we are so constituted, but so it is. The moral world has its laws as well as the material. Why a point of steel lifted above temple or dome should draw the thunderbolt and speed it safely to the ground I know not. How, in our moral constitution, an oath lifted to heaven can draw from the great swollen cloud of passion and of interest and of hate its charge I know not, but so it is. And be sure that loud and long as these honorable managers may talk, although they speak in the voice of "all the people

of the United States," with their bold persuasions that you shall not obey a judicial oath, I can bring against it but a single sentence and a single voice; but that sentence is a commandment and that voice speaks with authority, "Thou shalt not take the name of the Lord thy God in vain, for the Lord will not hold him guiltless that taketh his name in vain."

The moth may consume the ermine of that supreme justice whose robes you wear; rust, senators, may corrode the sceptre of your power; nay, Messrs. Managers, time even shall devour the people whose presence beating against the doors of this Senate-house you so much love to vaunt and menace, but of the word that I have spoken "heaven and earth shall pass away and no jot or tittle of it fail."

I have now reached, Mr. Chief Justice and Senators, a point where an adjournment would be agreeable, if such is the pleasure of the Senate.

Mr. CONKLING. I move that the Senate sitting as a court of impeachment adjourn until to-morrow.

The motion was agreed to; and the Senate, sitting for the trial of the impeachment, adjourned.

WEDNESDAY, *April* 29, 1868.

The Chief Justice of the United States took the chair.

The usual proclamation having been made by the Sergeant-at-arms,

The managers of the impeachment on the part of the House of Representatives and the counsel for the respondent, except Mr. Stanbery, appeared and took the seats assigned to them respectively.

The members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

The journal of yesterday's proceedings of the Senate, sitting for the trial of the impeachment, was read.

Mr. NELSON. Mr. Chief Justice and Senators——

Mr. SUMNER. Mr. President, before the gentleman makes a motion I send an order to the chair.

The CHIEF JUSTICE. The Secretary will read the order.

The chief clerk read the order, as follows:

Whereas Mr. Nelson, one of the counsel for the President, in addressing the Senate, has used disorderly words, as follows, namely: beginning with personalities directed to one of the managers he proceeded to say, "So far as any question that the gentleman desires to make of a personal character with me is concerned, this is not the place to make it. Let him make it elsewhere if he desires to do it;" and whereas such language, besides being discreditable to these proceedings, is apparently intended to provoke a duel or to signify a willingness to fight a duel, contrary to law and good morals: Therefore,

Ordered, That Mr. Nelson, one of the counsel of the President, has justly deserved the disapprobation of the Senate.

Mr. NELSON. Mr. Chief Justice and Senators——

The CHIEF JUSTICE. The counsel can proceed only by unanimous consent.

Mr. NELSON. I was just going to ask permission, Mr. Chief Justice.

Mr. SUMNER. I must object, unless it is in direct explanation.

Mr. NELSON. All I desire to say this morning to the Senate——

Mr. SUMNER. I must object, unless it is in direct explanation.

Mr. SHERMAN. I object to the consideration of the resolution.

Mr. NELSON. If you will permit, I will simply state this much——

Mr. SHERMAN. I have no objection to the explanation, but I object to the consideration of the resolution.

The CHIEF JUSTICE. I will ask the counsel whether he proposes to make an explanation.

Digitized by Google

Mr. NELSON. All that I desired to do, Mr. Chief Justice, this morning, was to read the letters, as I indicated to the Senate yesterday that I should ask permission to do. That is all I desire to do, with a single word of explanation.

The CHIEF JUSTICE. The resolution proposed by the senator from Massachusetts is not before the Senate if it is objected to.

Mr. SHERMAN. I object to its consideration now.

Mr. Manager BUTLER. If the President and Senate will spare me a single word, I trust, so far as I am concerned, that anything that arose out of what occurred yesterday may be ended from any language that the learned counsel used toward me, and I hope that no further action may be taken upon that matter. As to the reading of the letters, I propose to object to that until they can be proved in the usual course of judicial proceedings.

Mr. JOHNSON. Mr. Chief Justice, I move to lay the resolution offered by the senator from Massachusetts upon the table.

The CHIEF JUSTICE. It is not before the Senate.

Mr. NELSON. Senators, you will allow me to say one word?

Mr. SUMNER. Mr. President, I wish to inquire whether the gentleman can proceed except by unanimous consent.

The CHIEF JUSTICE. He cannot.

Mr. SUMNER. I must object to any person proceeding who has used the language in this chamber used by that gentleman.

Mr. TRUMBULL. Mr. President——

The CHIEF JUSTICE. The Chief Justice, perhaps, erred, through inadvertence, in responding to the senator from Massachusetts. The Senate undoubtedly can give leave to the counsel to proceed if it sees fit; but if any objection is made, the question whether he have leave or not must be submitted to the Senate.

Mr. TRUMBULL. Mr. President, after what has occurred, a statement having been received from the managers, I think it proper that the counsel should have permission also to make a statement in explanation; and I move that he have such leave.

The CHIEF JUSTICE. Senators, you who are in favor——

Mr. Manager BUTLER. Is that debatable?

The Chief Justice signified that it was not.

Mr. SUMNER. Mr. President, I wish to understand the nature of the motion made by the senator from Illinois. Is it that the counsel have leave to explain his language of yesterday, or that he have leave to introduce the letter?

Mr. JOHNSON. No debate is in order.

The CHIEF JUSTICE. Debate is not in order.

Mr. TRUMBULL. It is not in reference to letters. My motion is that he have leave to make his explanation; I do not know what it is. Inasmuch as one of the managers has made an explanation, I think it due to the counsel that he be allowed to make an explanation.

Mr. Manager BUTLER. Do you mean to have the letters read?

The CHIEF JUSTICE. Senators, you who agree that the counsel shall have leave to make an explanation to the Senate will say aye; contrary, no. (Putting the question.) The ayes appear to have it. The ayes have it.

Mr. NELSON. Mr. Chief Justice and Senators, I hope you will allow me before I make this explanation to say a single word in answer to the resolution offered by the honorable senator, [Mr. Sumner,] not for the purpose of censuring the senator, but for the purpose of saying to the Senate that the remarks which I made in the Senate yesterday were made under the heat of what I esteemed to be very great provocation. I intended no offence to the Senate in what I said. If anything is to be done with the gentleman's resolution, I hope the Senate will permit me, before disposing of that, to defend myself against this imputation, and to show the reason why I indulged in the remarks I did. But

Digitized by Google

as the honorable manager has signified a willingness that this thing shall end, I meet him in the same way. So far as I am concerned, I desire to say nothing more of a personal character whatever.

The letters which I desire to read——

Mr. Manager BUTLER. I object that they are not genuine nor proved.

Mr. NELSON. I read them merely as a part of my explanation.

Mr. Manager BUTLER. I do not think that can be done.

The CHIEF JUSTICE. The Chief Justice is under the impression that the leave does not extend to the reading of the letters. If he is wrong the Senate will correct him. If any senator chooses to make a motion that leave be given that will be put to the Senate.

Mr. DAVIS. Mr. Chief Justice, I rise to a point of order. After the Senate has permitted one of the counsel to make an explanation, I make the question whether a manager has any right to interpose an objection. I concede that a senator may have such a right; but I deny that a manager has any such right as that.

The CHIEF JUSTICE. The Chief Justice understood the motion of the senator from Illinois to be confined to an explanation of the personal matter which arose yesterday, and that it did not extend to the reading of the letters which the counsel proposed to submit to the Senate; but leave can be given if the Senate sees fit.

Mr. HOWARD. Mr. President, I beg leave respectfully to object to the reading of the letters which are proposed to be read by the counsel.

The CHIEF JUSTICE. No debate is in order; and no motion is at present before the Senate.

Mr. HOWARD. I raise the objection until after they have been presented to the managers for examination.

Mr. HENDRICKS. Mr. President, I move that the counsel be allowed to read so much of the letter as will show to the Senate what date it bears.

Mr. NELSON. That is all I want.

Mr. TIPTON. Mr. President, I call for the regular order of the morning, the defence of the President.

The CHIEF JUSTICE. The regular order is the motion of the Senator from Indiana. [Mr Hendricks.]

Mr. HOWE. I should like to hear the motion stated. I did not understand it.

The CHIEF JUSTICE. The senator from Indiana will restate his motion.

Mr. HENDRICKS. The motion which I made is that the attorney for the President be allowed to read so much of the letter as will show its date and the place at which it was written.

The CHIEF JUSTICE. Senators, the question is on the motion of the Senator from Indiana.

The motion was agreed to.

Mr. NELSON. The first letter to which I alluded is a letter bearing date March 9, 1868, addressed by Benjamin F. Butler to "Colonel J. W. Shaffer, Washington, District of Columbia."

Mr. JOHNSON. Does that purport to be an original letter or a copy?

Mr. NELSON. I understand it to purport to be an original letter. My understanding is that this is the genuine signature of Benjamin F. Butler, and these are the genuine and original signatures of John A. Logan and J. A. Garfield. I am not acquainted with the handwriting of the gentlemen, but only speak from information. If the Senate would allow me to read this letter—it is a very short one; I do not want to make any comment on it except merely to explain the matter about the dates.

Mr. Manager BUTLER. I have no objection if you allow me to reply to it.

Mr. HOWE. I must object.

Mr. HOWARD. I object to the reading of the letter.

Digitized by Google

The CHIEF JUSTICE. It cannot be read under the order which has been made.

Mr. NELSON. The fact to which I desire to call the attention of the Senate, and it is necessary for me to do so, is, that this letter in the caption bears date, as I have shown, on the 9th of March, 1868. It is signed here "Benjamin F. Butler." Below the signature of Benjamin F. Butler are the words, "I concur in the opinion above expressed by General Butler," signed "John A. Logan." Below that are the words "And I," signed "J. A. Garfield." There is no other date in that letter from beginning to end, except the 9th of March, 1868.

Mr. JOHNSON. Will the counsel permit me to ask whether the handwriting in which the date is written is the same apparently in which the letter is?

Mr. NELSON. The handwriting in which the date is written is precisely the same handwri ing as the address and body of the letter; but the signature to the letter, as I take it, is in a different handwriting from the body of the letter.

On the 16th of March, 1868, Mr. Chauncey F. Black addressed a letter to the President stating that he enclosed a copy of the letter to which I have just adverted; and in order that the Senate may understand that, you will observe that the copy is, as I believe, identical with the original letter which I have just produced——

Mr. HOWE. Mr. President——

The CHIEF JUSTICE. The gentleman will confine himself exclusively to the dates.

Mr. NELSON. Altogether to the dates; but I cannot, if your honor please, explain this thing about the dates without this reference, as the Senate will see. I am not trying to make an argument; I do not intend to violate any rule of the Senate knowingly; and your honor will see in a moment that I am not trying to make an argument.

Mr. HENDRICKS. Mr. President, my motion was that the attorney be allowed to read so much of the letter as would show the date. I think that is all that it is important for the Senate to know in this personal explanation, and I object to an explanation in regard to the letter going further, except so far as it is in direct response to the points made against him.

Mr. NELSON. If the honorable Senate and the Chief Justice will allow me to say a word there, I cannot explain about the date of this copy unless I tell you the difference between this paper and the other paper which I have read. It is impossible for me to explain the date otherwise. All I can say is that this copy bears the same date as the original, and has the additional signatures of Mr. Koontz, J. K. Moorhead, Thaddeus Stevens, J. G. Blaine, and John A. Bingham; and that there is no other date to this letter except the date in the caption of the letter. That is the only explanation I can make. You will see that the copy is precisely like the original down to the words, "And I, J. A. Garfield." Then comes in this letter, which as to these names is an original, the words "I concur. W. H Koontz;" followed by the names "J. K. Moorhead, Thaddeus Stevens, J. G. Blaine," and "John A. Bingham;" and in that paper, from beginning to end, there is no date but the 9th of March. That is the explanation I have to make.

The CHIEF JUSTICE. The counsel for the President will please proceed with the argument in defence.

Mr. CAMERON. Before the counsel proceeds I desire to submit an order.

The CHIEF JUSTICE. The Secretary will read the order proposed by the senator from Pennsylvania.

The chief clerk read the order, as follows:

That the Senate, sitting as a court of impeachment, shall hereafter hold night sessions, commencing at eight o'clock p. m. to-day and continuing until 11 o'clock p. m., until the arguments of the counsel for the President and of the managers on the part of the House of Representatives shall be concluded.

Mr. JOHNSON. I object.

Digitized by Google

The CHIEF JUSTICE. The present consideration being objected to, the order will lie upon the table.

Mr. Manager BUTLER. Shall these papers, Mr. President, which have been read be placed upon the records of the court now, so that we can get at them? The originals I desire.

The CHIEF JUSTICE. The Chief Justice is unable to answer that question. He takes it for granted that the counsel will submit them to the honorable managers.

Mr. Manager BUTLER. I beg your pardon. They were only submitted under insult.

Mr. NELSON. All I desired to do was this: the honorable gentlemen asked me to submit the letters to them. I said I would most assuredly let them have them if he would return the originals; and I would hand the letters and copies to them. The gentleman can take them with the understanding that he returns them to me.

The CHIEF JUSTICE. There can be no further discussion of this matter except with the consent of the Senate.

Mr. NELSON. There are the letters, [sending the papers to Mr. Manager Butler.]

Mr. Manager BUTLER. No, sir; let them go on the files.

Mr. NELSON. I will deposit them with the Secretary for the present.

Mr. Manager BUTLER. Let them go on the files.

[The papers were handed to the Secretary.]

The CHIEF JUSTICE. The counsel for the President will proceed with the argument.

Mr. EVARTS. Mr. Chief Justice and Senators, if indeed we have arrived at a settled conclusion that this is a court, that it is governed by the law, that it is to confine its attention to the facts applicable to the law, and regard the sole evidence of those facts to be embraced within the testimony of witnesses or documents produced in court, we have made great progress in separating, at least, from your further consideration much that has been impressed upon your attention heretofore.

If the idea of power and will is driven from this assembly, if the President is here no longer exposed to attacks upon the same principle on which men claim to hunt the lion and harpoon the whale, then, indeed, much that has been said by the honorable managers, and much that is urged upon your attention from so many quarters, falls harmless in your midst. It cannot be said of this Senate, *fertur numeris leges solutis*, that it is carried by numbers unrestrained by law. On the contrary, right here is might and power; and, as its servants and in its investigation and pursuit, your sole duty is exhausted. It follows from this that the President is to be tried upon the charges which are produced here, and not upon common fame, and least of all is he to be charged in your judgment, as he has been inveighed against hour after hour in argument, upon charges which the impeaching authority of the House of Representatives deliberately threw out as unworthy of impeachment and unsuitable for trial. We, at least, when we have an indictment brought into court and another indictment ignored and thrown out, are to be tried upon the former and not upon the latter. And if, on the 9th of December of the last year, the House of Representatives, with whom, by the Constitution, rests the sole impeaching power under this government, by a vote of one hundred and seven to fifty-seven, threw out all the topics that fill up the declamatory addresses of the learned managers, it is enough for me to say, that for reasons satisfactory to that authority, the House of Representatives, that bill was thrown out and those charges were withheld.

So, too, if it be a trial on public prosecution, and with the ends of public justice alone in view, the ordinary rule of restraint of the conduct of the prosecu-

ting authorities applies here; and I do not hesitate to say that this trial—to be, in our annals, the most conspicuous that our history will present; to be scrutinized by more professional eyes, by the attention of more scholars at home and abroad; to be preserved in more libraries; to be judged of as a national trait, a national scale, a national criterion forever—presents an unexampled spectacle of a prosecution that overreaches judgment from the very beginning and inveighs and selects and impugns and oppresses as if already convicted, at every stage, the victim they pursue. The duty, the constraint upon a prosecuting authority under a government of law pursuing only the public justice, is scarcely less strict and severe than that which rests upon the judge himself. To select evidence, having possession of better; to exclude evidence, knowing that it bears upon the inquiry; to restrict evidence, knowing that the field is thus closed against the true point of justice, is no part of a prosecuting authority's duty or power. Whatever may be permitted in the private contests of the forum, in the zeal of contending lawyers for contending clients, there is no such authority, no such duty, no such permission by our laws in a public prosecution. Much less, when the proofs have been thus kept narrow, when the charges are thus precise and technical, is it permissible for a prosecuting authority to enlarge the area of declamation and invective. Much less is it suitable for a public prosecution to inspire in the minds of the court prejudice and extravagance of jurisdiction beyond the points properly submitted.

It has usually been supposed that upon actual trials involving serious consequences forensic discussion was the true method of dealing with the subject, and we lawyers appearing for the President being, as Mr. Manager Boutwell has been polite enough to say, "attorneys whose practice of the law has sharpened but not enlarged their intellects," have confined ourselves to that method of forensic discussion. But we have learned here that there is another method of forensic controversy which may be called the method of concussion. I understand the method of concussion to be to make a violent, noisy, and explosive demonstration in the vicinity of the object of attack, whereas the method of discussion is to penetrate the position, and if successful to capture it. The Chinese method of warfare is the method of concussion, and consists of a great braying of trumpets, sounding of gongs, shouts, and shrieks in the neighborhood of the opposing force, which rolled away and the air clear and calm again, the effect is to be watched for. But it has been reserved for us in our modern warfare, as illustrated during the rebellion, to present a more singular and notable instance of the method of warfare by concussion than has ever been known before. A fort impregnable by the method of discussion, that is, penetrating and capturing it, has been on the largest scale attempted by the method of concussion, and some two hundred and fifty tons of gunpowder in a hulk moored near the stone walls of the fort has been made the means and the occasion of this vast experiment. Unsatisfied with that trial and its result, the honorable manager who opened this case [Mr. Butler] seems to have repeated the experiment in the vicinity of the Senate. [Laughter.] The air was filled with epithets, the dome shook with invective. Wretchedness and misery and suffering and blood, not included within the record, were made the means of this explosive mixture. And here we are surviving the concussion, and after all reduced to the humble and homely method of discussion which belongs to "attorneys whose intellects have been sharpened but not enlarged by the practice of the law." [Laughter.]

In approaching, then, the consideration of what constitutes impeachable offences, within the true method and duty of that solemn and unusual procedure and within the Constitution, we see why it was that the effort was to make this an inquisition of office instead of a trial of personal and constitutional guilt; for if it is an inquest of office, "crowner's quest law" will do throughout for us, instead of the more solemn precedents and the more dignified authorities and duties which belong to solemn trial. Mr. Manager Butler has given

Digitized by Google

us a very thorough and well-considered suggestion of what constitutes an impeachable offence. Let me ask your attention to it; and every one of these words is underscored by the honorable manager:

> We define, therefore, an impeachable high crime or misdemeanor to be one in its nature or consequences subversive of some fundamental or essential principle of government, or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for any improper purpose."

See what large elements are included in this, the manager's definition! It must be "subversive of some fundamental or essential principle of government," "highly prejudicial to the public interest," and must proceed from improper motives" and for an "improper purpose." That was intended, in the generality of its terms, to avoid the necessity of actual and positive crime; but it has given us in one regard everything that is needed to lift the peccability of these technical offences of mere statutory infraction out of the region of impeachable offence. It is not that you may accuse of a definite and formal crime, and then have outside of your indictment, not covered by charge or admitted for proof or countervailing proof, large accusations that touch these general subjects, but that the act under inquiry, charged and proved or refuted by proof, must be of itself such as, within its terms and regular and natural consequence, thus touches vital interests or fundamental principles. The fallacy of these general qualifying terms is in making them the substance of the crime instead of the conditions of impeachability. You must have the crime definite under law and Constitution, and even then it is not impeachable unless you affect it with some of the public and general and important qualities that are indicated in this definition of the learned and honorable manager.

We may look, perhaps, at the statement made by the managers of the House of Representatives on this subject of what constitutes an impeachable offence in the trial of Judge Peck, Mr. Buchanan, of Pennsylvania, chairman of the managers, being the speaker:

> What is an impeachable offence? This is a preliminary question which demands attention. It must be decided before the court can rightly understand what it is they have to try. The Constitution of the United States declares the tenure of the judicial office to be "during good behavior." Official misbehavior, therefore, in a judge, is a forfeiture of his office; but when we say this we have advanced only a small distance. Another question meets us. What is misbehavior in office? In answer to this question, and without pretending to furnish a definition, I freely admit we are bound to prove that the respondent has violated the Constitution, or some known law of the land. This, I think, was the principle fairly to be deduced from all the arguments on the trial of Judge Chase, and from the votes of the Senate in the articles of impeachment against him. (Peck's Trial, p. 127.)

That crime, in the sense of substantial guiltiness, personal delinquency, moral opprobrious blame, is included even under the largest and most liberal accusation that was espoused and defended by the managers in Hastings's impeachment, is to be gathered from one of the many splendid passages of Burke's invective in that cause:

> As to the crime which we charge, we first considered well what it was in its nature, and under all the circumstances which attended it. We weighed it with all its extenuations and with all its aggravations. On that review we are warranted to assert that the crimes with which we charge the prisoner at the bar are substantial crimes; that they are no errors or mistakes, such as wise and good men might possibly fall into; which may even produce very pernicious effects without being, in fact, great offences. The Commons are too liberal not to allow for the difficulties of a great and arduous public situation. They know too well the domineering necessities which frequently occur in all great affairs. They know the exigency of a pressing occasion which in its precipitate career bears everything down before it, which does not give time to the mind to recollect its faculties, to re-enforce its reason and to have recourse to fixed principles, but by compelling an instant and tumultuous decision too often obliges men to decide in a manner that calm judgment would certainly have rejected. We know, as we are to be served by men, that the persons who serve us must be tried as men, and with a very large allowance indeed to human infirmity and human error. This, my lords, we knew, and we weighed before we came before you. But the crimes which we

Digitized by Google

charge in these articles are not lapses, defects, errors of common human frailty, which, as we know and feel, we can allow for. We charge this offender with no crimes that have not arisen from passions which it is criminal to harbor; with no offences that have not their root in avarice, rapacity, pride, insolence, ferocity, treachery, cruelty, malignity of temper; in short, in nothing that does not argue a total extinction of all moral principle, that does not manifest an inveterate blackness, dyed ingrain with malice, vitiated, corrupted, gangrened to the very core. If we do not plant his crimes in those vices which the heart of man is made to abhor, and the spirit of all laws, human and divine, to interdict, we desire no longer to be heard on this occasion. Let everything that can be pleaded on the ground of surprise or error upon those grounds be pleaded with success; we give up the whole of those predicaments. We urge no crimes that are not crimes of forethought. We charge him with nothing that he did not commit upon deliberation; that he did not commit against advice, supplication, and remonstrance; that he did not commit against the direct command of lawful authority; that he did not commit after reproof and reprimand, the reproof and reprimand of those who are authorized by the laws to reprove and reprimand him. The crimes of Mr. Hastings are crimes not only in themselves, but aggravated by being crimes of contumacy. They were crimes not against forms, but against those eternal laws of justice which are our rule and our birthright. His offences are not in formal, technical language, but in reality, in substance and effect, *high* crimes and high misdemeanors. (Burke's Works, vol. 7, pp. 13, 14.)

And so the articles charged them, not leaving it to the declamation or invention of the orators of that great occasion. I need not insist, in repetition of the very definite, concise, and I must think effective argument of the learned counsel who opened this case for the respondent, [Mr. Curtis,] upon the strict constitutional necessity, under the clause prohibiting *ex post facto* laws, and under the clause prohibiting bills of attainder, and under the clauses that fix the trial as for crime in the Constitution under the designation in the articles of enumeration of "treason" and "bribery" alone, the highest great crimes against the State that can be imagined, that you should have here what is crime against the Constitution and crime against the law, and then that it should have those public proportions that are indicated in the definition of the opening manager, and those traits of freedom from error and mistake and doubt and difficulty which belong, in the language of Mr. Burke, to an arduous public station. And then you will perceive that under these necessary conditions either this judgment must be arrived at, that there is no impeachable offence here which covers and carries with it these conditions, or else that the evidence offered on the part of the respondent that was to negative, that was to countervail, that was to reduce, that was to refute all these qualifications should have been admitted; and when a court like this has excluded the whole range of evidence relating to the public character of the accused and the difficulties of an arduous public situation, it must have determined that the crimes charged do not partake of that quality, or else it would have required them to have been affirmatively supported by proofs giving those qualifications, and permitted them to be reduced by countervailing evidence. And when a court sits only for a special trial, when its proceedings are incapable of review, when neither its law nor its fact can be dissected, even by reconsideration within its own tribunal, the necessary consequence is that, when you come to make up your judgment, either you must take as for granted all that we offered to prove, all that can fairly be embraced as to come in, in form, in substance, in color, and in fact, by the actual production of such proof, so that your judgment may thus proceed; or else it is your duty before you reach the irrevocable step of judgment and sentence to resume the trial and call in the rejected evidence. I submit it to you that a court without review, without new trial, without exception, and without possible correction of errors, must deal with evidence in this spirit and upon this rule. And unless you arrive, as I suppose you must, at the conclusion that the dimensions of this trial relate to the formal, technical infraction of the statute law that has been adduced in evidence here, it will be your duty to reopen your doors, call the respondent again before you, and go into the field of inquiry that has been touched in declamation, but has not been permitted in proof.

But, Mr. Chief Justice and senators, there is no better mode of determining whether a crime accorded to a particular jurisdiction and embraced within a

particular prohibition is to be a high crime and misdemeanor, and what a high crime and misdemeanor means, and what the lowest level and the narrowest limit of its magnitude and of its height must be, than to look at its punishment. Epithets, newly-invented epithets, used in laws do not alter the substance of things. Your legislation of the 2d of March, 1867, introducing into a statute law the qualifying word "high," applied to a misdemeanor, is its first appearance in the statute law of this country or of the parent country from whom we draw our jurisprudence. It means nothing to a lawyer. There is in the conspiracy act of 1861 the same introduction of the word "high" as applied to the body of the offence there called "a crime." A "high crime" it is called in this little conspiracy act of 1861, and there in the one instance and here in the other an epithet is thrown into an act of Congress. But, Mr. Chief Justice and Senators, when the legislative authority in its scale of punishment makes it, as the common sense of mankind considers, great in its penalty, terrible in its consequences, that is a legislative statement of what the quality of the crime is. When you put into a statute that the offence shall be punished by death you need no epithet to show that that is a great, a heinous crime; and when the framers of this Constitution put into it, as the necessary result of the trial of the President of the United States and his conviction, that his punishment should be deprivation of office, and that the public should suffer the necessity of a new election, that showed you what they meant by "high crime or misdemeanor."

I know that soft words have been used by every manager here on the subject of the mercy of our Constitution and the smallness of the punishment; that it does not touch life, limb, or property. Is that the sum of penalties? Is that the measure of oppression of punishment? Why, you might as well say that when the mother feels for the first time her new-born infant's breath, and it is snatched from her and destroyed before her eyes, she has not been deprived of life, liberty, or property. In a republic where public spirit is the life, and where public virtue is the glory of the state, and in the presence of public men possessing great public talents, high public passions, and ambitions, made up, as this body is, of men sprung, many of them, from the ordinary condition of American life, and by the force of their native talents, and by the high qualities of endurance and devotion to the public service, who have lifted themselves into this eminent position, if not the envy, the admiration of all their countrymen, it is gravely proposed to you, some of whom from this elevated position do not disdain to look upon the presidency of the United States as still a higher, a nobler, a greater office, if not of pride, yet of duty, that you shall feel and say that it is a little thing to take a President from his public station and strike him to the ground, branded with high crime and misdemeanor, to be a byword and reproach through the long gauntlet of history forever and forever. In the great hall of Venice, where long rows of doges cover with their portraits the walls, the one erased, the one defeatured canvass attracts to it every eye; and one who has shown his devotion to the public service from the earliest beginning, and you who have attended in equal steps that same ascent upward, and now, in the very height and flight of your ambition, feel your pinions scorched and the firm sockets of your flight melted under this horrid blaze of impeachment, are to be told, as you sink forever, not into a pool of oblivion, but of infamy, and as you carry with you to your posterity to the latest generation this infamy, that it is a trifling matter, and does not touch life, liberty, or property! If these are the estimates of public character, of public fame, and of public disgrace by which you, the leaders of this country, the most honored men in it, are to record your estimate of the public spirit and of the public virtue of the American state, you have indeed written for the youth of this country the solemn lesson that it is dust and ashes.

Now, what escape is there from this conclusion, in every true estimate of the

Digitized by Google

character of this procedure and of the result that you seek to fasten upon this President if justice requires it, to say that it is trifling and trivial and that formal and technical crime may lead to it? Do the people of this country expect to be called to a presidential election in the middle of a term, altering the whole calendar, it may be, of the government, because there has been an infraction of a penal statute carrying no consequences beyond? It is accidental, to be sure, that the enforced and irregular election that may follow upon your sentence at this time concurs with the usual period of the quadrennial election; but it is merely accidental. And yet these, senators, are gravely proposed to you as trivial results that are to follow from a judgment on an accusation of the character and of the quality that I have stated in fact, as compared with the quality and the character that it should bear in truth.

In reference to this criminality of the infraction of the statute, which in the general remarks that I am making you will see furnishes the principal basis of charge that I am regarding, we may see from the statute itself what the measure of criminality there given is, what the measure under indictment would be or might be, and then you will see that that infraction, if it occurred, and if it were against the law and punishable by the law under the ordinary methods and procedures of our common courts of justice, furnishes not only no vindication of, but no support to, the notion that upon it can be ingrafted the accusation of impeachment, the accusation of criminality that is impeachable, any more than any other topic of comparatively limited and trivial interest and concern. The provision is not that there must be a necessary penalty of gravity, but that under the scale of imprisonment and fine the only limit is that it shall not exceed $10,000 of pecuniary liability and five years of imprisonment. Six cents fine, one day's imprisonment, according to the nature of the offence, within the discretion of the court, may satisfy the public justice under indictment in regard to this offence which is claimed as the footing and front of the President's fault.

Nor was this open, unrestricted mercy of the law unattended to in debate. The honorable senator from Massachusetts, [Mr. SUMNER,] in the course of the discussion of this section of the bill, having suggested that it would be well, at least, to have a moderate minimum of punishment that would secure something like substance necessarily in the penal infliction, and having suggested $1,000 or $500 as the lower limit, basing upon this wise intimation that some time or other there might be a trial under this section before a court that had a political bias and the judge might let the man off without any substantial punishment, he was met by the honorable senator from Vermont, [Mr. Edmunds,] and the honorable senator from Oregon, [Mr. Williams,] who seemed to have the conduct of the bill, at least in respect to these particular provisions, in the way to which I will attract your attention. Mr. SUMNER said:

> Shall we not in this case, where political opinion may intrude on the bench, make a provision that shall at least secure a certain degree of punishment?

Mr. EDMUNDS defended the unlimited discretion of punishment.

Mr. WILLIAMS said:

> I concur in the views expressed by the senator from Vermont, for the reason, in the first place, that this is a new offence created by statute, and it does not define a crime involving moral turpitude, but rather a political offence; and there is some ground to suppose that mistakes may be made under this law by persons in office; and I think that in such case there should be a large discretion left to the court.

So much for indictment; so much for the wise reasons of our legislators; and then, that being the measure and the reason, there is clamped upon this a necessary, an inevitable, an inexorable result that is to bring these vast consequences to the state and to the respondent. But even then you do not know or understand the full measure of discretion, unless you attend to the fact that such formal, technical crimes when made the subject of conviction and of sentence in obedience to the law are, under a principle of our Constitution and of

Digitized by Google

every other just, I will not say merciful, government in the world, made subjects of pardon; but under this process of impeachment, with but one punishment, and that the highest in the public fame and character of men that is known or that can be conceived, we have this further, this terrible additional quality, that the punishment is immitigable, immutable, irreversible, unpardonable, and no power whatever can lighten or relieve the load with which an impeached and convicted public servant goes forth from your chambers in a just exercise of this power of impeachment with a punishment heavier than he can bear.

And now, what answer is there to this but an answer that will take a load of punishment and of infamy from him and place it somewhere else? True it is that if he be unjustly convicted, if he be convicted for technical and formal faults, then the judgment of the great nation, of intelligent and independent men, stamps upon his judges the consequences that they have failed to inflict upon the victim of their power. Then it is that the maxim *si innocens damnatur, judex bis damnatur*, finds its realization in the terrors of public opinion and the recorded truths of history.

I have introduced these considerations simply to show you that these notions that if you can prove that a man has stumbled over the statute it is essential that he should bear these penalties and these consequences find no support in reason, none in law, none in the Constitution, none in the good sense of this high tribunal, none in the habits and views of the great people whom we represent. Indeed, we should come under the condemnation of the speaker in Terrence if we were to seek upon this narrow, necessary view, as it is urged, of law, such consequences as I have stated: *Summum jus sæpe summa est malitia*, an extremity of the law is often the extremity of wickedness.

And now I am prepared to consider the general traits and qualities of this offence charged; and I shall endeavor to pursue in the course of my argument a consideration, perhaps not always formal nor always exactly defined, of three propositions:

1. That the alleged infractions of these penal statutes are not in themselves, nor in any quality or color that has been fastened upon them by the evidence in this cause, impeachable offences.

2. Having an application to the same conclusion, that whatever else there is attendant, appurtenant, or in the neighborhood of the subjects thus presented to your consideration, they are wholly political, and not the subject of jurisdiction in this court or in any court, but only in the great forum of the popular judgment, to be debated there at the hustings and in the newspapers by the orators and the writers to whom we are always so much indebted for correct and accurate views on subjects presented for such determination. If I shall have accomplished this I shall have accomplished everything. I shall have drawn attention to the true dimensions in a constitutional view of the crime alleged even if it has been committed, and shall have shown by a reflex application of the argument that it is mere error and confusion, perhaps pardonable in an impeaching authority, but unpardonable in a court of judgment, to confound things political with things criminal.

And then, third, I shall ask your attention to the precise traits and facts as disclosed in the evidence charged in the articles, and bring you, I think, to a safe, an indisputable, firm, and thorough conclusion that even the alleged infractions of penal law have none of them, in fact, taken place.

Now, let us look at this criminality in the point upon which, in the largest view of any evidence in support of it given on the part of the managers, it must turn. We must separate, at least for the purpose of argument, the inuendoes, the imputations, the aggravations that find their place only in the oratory of the managers, or only in your own minds as conversant with the political situation and enlisted zealously in the rightful controversies which belong to it as a polit-

ical situation, and we are then to treat the subject in this method: that up to twelve o'clock on February the 21st, 1868, the President was innocent and unimpeachable, and at one o'clock on the same day he was guilty and impeachable of the string of offences that fill up all the articles except that devoted to the speeches, the tenth; for whatever he did was done then at that point of time, leaving out the Emory article, which relates to a conversation on the morning of the 22d, and which I also should have excepted from these observations. What he did was all in writing. What he did was all public and official. What he did was communicated to all the authorities of the government having relation to the subject. Therefore you have at once proposed for your consideration a fault, not of personal delinquency, not of immorality or turpitude, not one that disparages in the judgment of mankind, not one that degrades or affects the position of the malefactor; it is, as Mr. Senator Williams truly said, a "new offence," also, an offence "not involving turpitude, and rather of a political character."

Now, too, upon these proofs the offence carries no consequences beyond what its action indicates, to wit: a change in the head of a department. It is not a change of the department. It is not an attempt to wrest a department or apply an office against the law, contrary to the regulations of the government, and turn its power against the safety or peace of the state; not in the least. Whatever imaginations may suggest, whatever invective and opprobrium may intimate, the fact is that it had no other object, had no other plan, would have had no other consequences—I mean within the limits of this indictment and of this proof—than to substitute for Mr. Stanton some other citizen of the United States that by and with the advice and consent of the Senate should be approved for that high place, or to fill it until that advice and consent should be given by some legal *ad interim* holder of the office, not filling it, but discharging its duties.

If, then, the removal had been effected, if the effort to assert a constitutional authority by the President had been effectual, no pretence is made, or can be made, that anything would have been accomplished that could be considered as a turning of the government or any branch of its service out of the authority of law. Neither did it in purpose or consequences involve any change in the policy of the Executive of the United States in the War Department or in its management. Whatever there might have been of favor or support in public opinion, in political opinion, in the wishes and feelings of the Congresses of the United States in favor of Mr. Stanton for that post, and however well deserved all that might be, senators cannot refuse to understand that that does not furnish a reason why the offence committed by a change of the head of a department should be exaggerated into a crime against the safety of the state.

But I think we may go further than that, and say that however great may have been the credit with the houses of Congress and with the people, or with the men of his own party, which the Secretary of War, Mr. Stanton, enjoyed, it cannot be denied that there was a general and substantial concurrence of feeling in this body, among all the public men in the service of the government, and among the citizens in general, that the situation disclosed to public view and public criticism of an antagonism between the head of a department and the President of the United States was not suitable to the public service, and was not to be encouraged as a situation in the conduct of the executive government, and that there was a general opinion among thoughtful and considerate people that however much the politics of the Secretary of War might be regarded as better than the politics of the President, if we would uphold the frame of government and recognize the official rights that belong to the two positions, it was a fair and just thing for the President to expect that the retirement should take place on the part of the Secretary rather than that he, the President, should be driven to a forced resignation himself, or to the necessity of being maimed and crippled in the conduct of the public service.

Digitized by Google

It follows necessarily, then, that the whole criminality, in act, in purpose, and in consequence, that in this general survey we can attach to the imputed offence, is a formal contravention of a statute. I will not say how criminal that may be. I will not say whether absolute, undeviating, inflexible, perfect obedience to every law of the land may not be exacted under the penalty of death from everybody holding public station. That is matter of judgment for legislators; but nevertheless the morality, the policy, the quality of the transaction cannot be otherwise affected than so far as the actual punishments of the statute are made applicable. When you consider that this new law, thus passed, really "reverses the whole action of this government," in the language of senators and representatives who spoke in its behalf during its passage; that in the language of the same debaters it "revolutionizes the practice of the government;" and when you consider that the only person in the United States that this law, in respect to the removal from office, was intended or by its terms could affect was the President of the United States; that nobody else was subject to the law; that it was made a rule, a control, a restraint, a mandate, a direction to nobody else in the United States except the President, just as distinctly as if it had said in its terms, "If the President of the United States shall remove from office he shall be punished by fine and imprisonment;" and when you know that by at least debated and disputed contests it was claimed that the President of the United States had the right to remove, and that an inhibition upon that right was a direct assertion of congressional authority aimed at the President in his public trust, duty, and authority of carrying on the executive government, you can then at once see that by a necessary exclusion and conclusion, however much the act may have been against the law in fact as on subsequent judgment may be held by this or any other court, yet it was an act of that nature, forbidden under those circumstances, and to be attempted under those obligations of duty, if attempted at all, which gave it this quality, and you see at once that no rhetoric, that no argument, that no politics whatever can fix upon the offence, completed or attempted, any other quality than this: a violation of a law, if it shall be so held, in support of and in obedience to the higher obligation of the Constitution. Whenever anybody puts himself in that position, nobody can make a crime of it in the moral judgment, in the judicial determination. In sentence and measure of punishment, at least, if not in formal decision and judgment, no man can make a crime of it.

We are treated to the most extraordinary view on the subject of violating what is called an unconstitutional law. Why, nobody ever violates an unconstitutional law, because there never is any such obstacle to a man's action, freedom, duty, right, as an unconstitutional law. The question is whether he violates law, not whether he violates a written paper published in a statute-book, but whether he violates law; and the first lessons under a written Constitution are and must be that a law unconstitutional is no law at all. The learned manager, Mr. Boutwell, speaks of a law being, possibly, he says, capable of being annulled by the judgment of the Supreme Court. Why, the Supreme Court never annuls a law. There is not any difference in the binding force of the law after the Supreme Court has annulled it, as he calls it, from what there was before. The Supreme Court has no political function; it has no authority of will or power to annul a law. It has the faculty of judgment, to discern what the law is, and what it always has been, and so to declare it.

Apply it to an indictment under this very statute, and supposing the law is unconstitutional, for the purpose of argument, what is the result? Is the man to be punished because he has violated the law, and the Supreme Court has not as yet declared it unconstitutional? No; he comes into court and says, "I have violated no law." The statute is read; the Constitution is read; and the judge says, "You have violated no law." That is the end of the matter; and he does not want to appeal to the discretion of the court in the measure of pun-

ishment, or to the mercy of the Executive in the matter of pardon. He has done what was right, and he needs to make no apology to Congress or anybody else, and Congress, in so far as it has not protected the public servant, rather owes an apology to him. I shall consider this matter more fully hereafter; and now look at it only in the view of fixing such reduced and necessarily reduced estimate of the criminality imputed as makes it impossible that this should be an impeachable offence.

Much has been said about the duty of the people to obey and of officers to execute unconstitutional laws. I claim for the President no greater right in respect to a law that operates upon him in his public duty, and upon him exclusively, to raise a question under the Constitution to determine what his right and what his duty is, than I claim for every citizen in his private capacity when a law infringes upon his constitutional and civil and personal rights; for to say that Congress has no right to pass unconstitutional laws and yet that everybody is to obey them just as if they were constitutional and to be punished for breaking them just as if they were constitutional, and to be prevented from raising the question whether they are constitutional by penal inflictions that are to fall upon them whether they succeed in proving them unconstitutional or not, is, of course, trampling the Constitution and its defence of those who obey it in the dust. Who will obey the Constitution as against an act of Congress that invades it, if the act of Congress with the sword of its justice can cut off his head and the Constitution has no power to save him, and nothing but debate hereafter as to whether he was properly punished or not? The gentlemen neglect the first, the necessary conditions of all constitutional government, when they press upon us arguments of this nature.

But again, the form alleged of infraction of this law, whether it was constitutional or unconstitutional, is not such as to bring any person within any imputation, I will not say of formal infraction of the law, but of any violent, wilful use and extent of resistance to or contempt of the law. Nothing was done whatever but to issue a paper and have it delivered, which puts the posture of the thing in this condition and nothing else: the Constitution, we will suppose, says that the President has a right to remove the Secretary of War; the act of Congress says the President shall not remove the Secretary of War; the President says, "I will issue an official order which will raise the same question between my conduct and the statute that the statute raises between itself and the Constitution." As there is not and cannot be and never should be a reference of a law abstractly to the revision and determination of the Supreme Court or of any other court, which would be making it a council of revision and of superior and paramount political and legislative authority, so when the Constitution and a law are, or are supposed to be, at variance and inconsistent, everybody upon whose right this inconsistency intrudes has a right under the usual ethical conditions of conduct of good citizenship to put himself in a position to act under the Constitution and not under the law. And thus the President of the United States, as it is all on paper thus far—the Constitution is on paper, the law is on paper—issues an order on paper which is but an assertion of the Constitution and a denial of the law, and that paper has legal validity if the Constitution sustains it, and is legally invalid and ineffectual, a mere *imbelle telum*, if the law prohibits it and the law is conformed to the Constitution. Therefore it appears that nothing was done but the mere course and process of the exercise of right claimed under the Constitution without force, without violence, and making nothing but the attitude, the assertion which, if unquestioned, might raise the point for judicial determination.

Now, senators, you are not, you cannot be unfamiliar with the principle of our criminal law, the good sense, the common justice of which, although it sometimes is pushed to extremes, approves itself to every honest mind, that criminal punishments, under any form of statute definitions of crime, shall never be made

Digitized by Google

to operate upon acts even of force and violation that are or honestly may be believed to be done under a claim of right. It is for this purpose that the *animus*, the intent, the *animus furandi* in case of larceny, the malice prepense in a case of murder, the intent necessary in every crime, is made the very substance of the crime, and nothing is felt to be more oppressive, and nothing has fewer precedents in the history of our legislation or of our judicial decisions, than any attempt to coerce the assertion of peaceable and civil claims of right by penal enactments. It is for that reason that our communities and our law-givers have always frowned upon any attempt to coerce the right of appeal under any restrictions or any penalties of costs of a character oppressive. Civil rights are rights valuable and practical just according as people can avail themselves of them, they keeping the peace; and the moment you put the coercion of punishment upon the assertion of a right, a claimed right, in a manner not violating the peace and not touching the public safety, you infringe one of the necessary liberties of every citizen.

Although I confess that I feel great reluctance, and it is contrary to my own taste and judgment very much to mingle what is but a low level of illustration and argument with so grave and general a subject as determining the dimensions and qualities of an impeachable offence, yet, on the other hand, day after day it is pressed upon you that a formal violation of a statute, although made under the claim of a constitutional right and duty honestly felt and possessed by the President, is nevertheless a ground of impeachment, not to be impeded or prevented by any of these considerations; and hence I am induced to ask your attention to what is but an illustration of the general principle, that penal laws shall not be enforced in regard to an intent which is governed by a claim of right. And this singular case occurred: a poacher who had set his wires within the domain of a lord of the manor had caught a pheasant in his wires; the gamekeeper took possession of the wires and of the dead pheasant, and then the poacher approaches him by threats of violence, which would amount to robbery, not larceny, takes from him the wires and the dead pheasant, and the poacher situated in that way on other's dominions, and thus putting himself in a condition where the humanity of the law can hardly reach and protect him, is brought into question and tried for robbery; and Vaughan, Baron, says:

> If the prisoner demanded the wires under the honest impression that he had a right to them, though he might be liable to a trespass in setting them, it would not be a robbery. The gamekeeper had a right to take them, and when so taken they never could have been recovered from him by the prisoner; yet, still, if the prisoner acted under the honest belief that the property in them continued in himself, I think it is not a robbery. If, however, he used it merely as a pretense, it would be robbery. The question for the jury is, whether the prisoner did honestly believe he had a property in the snares and pheasant or not. (1 Russell on Crimes, 872.)

Thus does the criminal law of a free people distinguish between technical and actual fault; and what mean the guarantees of the Constitution, and what mean the principles and the habits of English liberty, that will not allow anybody enjoying those liberties to be drawn into question criminally upon any technical or formal view of the law to be administered by hide-bound authority or judges established and devoted to the prosecution of crime; what mean those fundamental provisions of our liberty, that no man shall be put on trial on an accusation of crime, though formally committed, unless the grand jury shall choose to bring him under inculpation, and that when thus brought under inculpation, he shall not be condemned by any judge or magistrate, but the warm and living condemnation of his peers shall be added to the judicial determination, or he shall go free? Surely we have not forgotten our rights and our liberties, and upon what they rest, that we should bring a President of the United States under a formal apparatus of iron operation, that by necessity, if you set it agoing, shall, without crime, without fault, without turpitude, without moral

fault even of violating a statute that he believed to be a statute binding upon him, bring about this monstrous conclusion—I do not mean in any condemnation of it, but monstrous in its dimensions—of depriving him of his office and the people of the country of an executive head.

Mr. CONKLING. Mr. President, I move an intermission of fifteen minutes.

The motion was agreed to; and at the expiration of the recess the Chief Justice resumed the chair and called the Senate to order.

Mr. EVARTS. I am quite amazed, Mr. Chief Justice and Senators, at the manner in which these learned managers are disposed to bear down upon people that obey the Constitution to the neglect or avoidance of a law. It is the commonest duty of the profession to advise, it is the commonest duty of the profession to maintain and defend the violation of a law in obedience to the Constitution; and in the case of an officer whose duty is ministerial, whose whole obligation in his official capacity is to execute or to give free course to a law, even when the law does not bear at all upon him or his rights, the officer may appeal to the courts if he acts in good faith and for the purpose of the public service, and with a view of ascertaining by the ultimate tribunal in season to prevent public mischiefs, whether the Constitution or the law is to be the rule of his conduct, and whether they be at variance.

Let me ask your attention to a case in Selden's Reports in the New York court of appeals, (3 Selden, page 9,) the case of Newell, the auditor of the canal department, in error, against the people. The constitution of the State of New York contains provisions restrictive upon the capacity or power of the legislature to incur public debt. The legislature, deeming it, however, within its right to raise money for the completion of the canals upon a pledge of the canals and their revenues, not including what may be called the personal obligation of the State, a dry mortgage as it were, not involving debt, but only carrying the pledge, undertook to and did raise a loan of $6,000,000. Mr. Newell, the canal auditor, when a draft was drawn upon him in his official capacity, which it became him as a ministerial officer, obedient to the law, to honor and proceed upon, refused it honor, and raised the question whether this act was constitutional. Well, now, he ought to have been impeached! He ought to have had the senate and the court of appeals of New York convened on him and been removed from office! The idea of a canal auditor setting himself up against what the learned manager calls law! He set himself up in favor of law and against its contravention, and the question was carried through the supreme court of that State, and the supreme court of that State decided that the law was constitutional, but upon an appeal to the court of appeals that court held it unconstitutional, and the $6,000,000 loan was rolled away as a scroll, needing to be fortified by an indemnifying proceeding amending the constitution and extending its provisions.

Now, I should like to know if the President of the United States, who has taken an oath to preserve, protect, and defend the Constitution of the United States, in reference to a law that is made over his head and on his right, and over and on nothing else in this nation, cannot appeal to the Constitution? And when he does make the appeal is the Constitution to answer him, through the House of Representatives, "We admit, for argument, that the law is unconstitutional; we admit it operates on you and your trust-right, and nothing else; we admit that you were going to raise the constitutional question, and yet the process of impeachment is the peril under which you do that, and its axe is to cut off your head for questioning an unconstitutional law that operates upon your right and contravenes that Constitution which you have sworn to protect and defend in every department of the government, on and for the legislature, on and for the judiciary, on and for the people, on and for the executive power?" How will our learned managers dispose of this case of Newell, the auditor, against the people of the State of New York—a worthy, an upright, a useful, a pros-

Digitized by Google

perous assertion in the common interest and for the maintenance of the constitution, of a duty to the people?

And are we such bad citizens when we advise that the Constitution of the United States may be upheld, and that anybody, without a breach of the peace and in an honest purpose, may make a case that the instance may be given whereby the judgment of the court may be had and the Constitution saved from violation? Not long since the State of New York passed a law levying a tax on brokerage sales in the city of New York of a half or three-fourths per cent. on all goods that should be sold by brokers, seeking to raise for the revenue purposes of the State of New York about ten million dollars on the brokers' sales of merchandise, which sales distribute through the operations of that emporium the commerce of the whole country for consumption through all the States in the Union. Your sugar, your tea, your coffee that you consume in the valley of the Mississippi was to be made to pay a tax in the city of New York to support the State of New York in its government by that tax; and they made it penal for any broker to sell without giving a bond and paying the tax. Was it very wicked for me, when all the brokers were in this distress, to advise them that the shortest way to settle that matter was not to give the bond; and when one of them, one of the most respectable citizens of the city, was indicted by the grand jury for selling coffee without giving a bond, and it came before the courts, instead of having, as I supposed when I gave my advice, to come up to the Supreme Court of the United States to vindicate the Constitution of the United States, I had the good fortune to succeed in the court of appeals of the State of New York itself, that court holding that the law was unconstitutional, and the indictment failed. Was I a bad citizen for saving the Constitution of the United States against these infractions of law? Was the defendant in the indictments a bad citizen for undertaking to obey the Constitution of the United States? Where are your constitutional decisions—McCulloch *vs.* Maryland; Brown *vs.* Maryland; the bank-tax cases—all these instances by which a constitution is arrayed for the protection of the rights which it secures? It is always by instances, it is always by acts; and the only ethical condition is that it shall be done without a breach of the peace and in good faith.

How is it with people in office that violate, sometimes, the law? Is it true that they must necessarily be punished for it? Mr. Lincoln, before the "invasion" or "insurrection" broke out, had raised the case of the Constitution for the suspension of the *habeas corpus*, undertook to arrest a mischief that was going on at Key West, where, through the forms of peace, an attack was made upon the government fort there through the *habeas corpus*. An excellent way to take a fort! I do not know whether the honorable manager, [Mr. Butler,] who is so good a lawyer, tried that in all his military experience or not, [laughter;] but the *habeas corpus* was resorted to down in Florida to empty that fort of all its soldiers, and was succeeding admirably. A judge issued the *habeas corpus;* the soldier was brought out, and then he was free; and so the fort would have been taken by *habeas corpus*. President Lincoln suspended the *habeas corpus*, violating the law, violating the Constitution. Should he have been impeached? Is it necessary that a man should be impeached? What did he do? He suspended it by proclamation of the 10th of May, 1861, to be found in volume twelve Statutes at Large, page 1260; and at the opening of the next session he referred to the fact that the legality of the measures was questioned, and said they were ventured upon under a public necessity, and submitted to the judgment of Congress whether there should be legislation or not. That is found on pages 12 and 13 of the Senate Journal, first session thirty-seventh Congress, 1861.

There were various other acts of this great, heroic, good President—the arrest of the members of the legislature of Maryland, never justified by any law or any constitution that I know of, but wholly justified by duty to the country.

Digitized by Google

And it so happens, what every statesman knows as the experience of government, that public action is to be judged by public men and public officers as private actions are to be judged by private men, according to the quality of the act, whether it shall be impeached or whether it shall be indemnified.

I do not seek this argument as going further than to meet the necessity which I understand these learned managers put forth that an infraction of a statute must carry out of office any President of the United States who is so guilty. Why, the very next statute in the book before me, after the civil-office-tenure act, on page 232 of the volume, is an act to declare valid and conclusive certain proclamations of the President and acts done in pursuance thereof, or of his orders, for the suppression of the late rebellion against the United States. The military commissions had been declared invalid by the Supreme Court, and we have an act of indemnity covering a multitude of formal, technical sins by indemnity and protection to have the same effect as if the law had been passed before they were performed. So, therefore, this dry, dead interpretation of law and duty by which act, act, act, unqualified, unscrutinized, unweighed, unmeasured, is to form the basis of necessary action of the guillotine of impeachment, disappears wholly under the clear, bright, and honest light which true statesmanship sheds upon the subject.

I may as conveniently at this point of the argument as at any other pay some attention to the astronomical punishment which the learned and honorable manager, Mr. Boutwell, thinks should be applied to this novel case of impeachment of the President. Cicero I think it is who says that a lawyer should know everything, for sooner or later there is no fact in history, in science, or of human knowledge that will not come into play in his arguments. Painfully sensible of my ignorance, being devoted to a profession which "sharpens and does not enlarge the mind," [laughter,] I yet can admire without envy the superior knowledge evinced by the honorable manager. Indeed, upon my soul, I believe he is aware of an astronomical fact which many professors of that science are wholly ignorant of. But nevertheless, while some of his honorable colleagues were paying attention to an unoccupied and unappropriated island on the surface of the seas, Mr. Manager Boutwell, more ambitious, had discovered an untenanted and unappropriated region in the skies, reserved, he would have us think, in the final councils of the Almighty, as the place of punishment for convicted and deposed American Presidents. [Laughter.]

At first I thought that his mind had become so "enlarged" that it was not "sharp" enough to discover the Constitution had limited the punishment; but on reflection I saw that he was as legal and logical as he was ambitious and astronomical, [laughter,] for the Constitution has said "removal from office," and has put no limit to the distance of the removal, [laughter,] so that it may be, without shedding a drop of his blood, or taking a penny of his property, or confining his limbs, instant removal from office and transportation to the skies. [Laughter.] Truly, this is a great undertaking; and if the learned manager can only get over the obstacles of the laws of nature the Constitution will not stand in his way. He can contrive no method but that of a convulsion of the earth that shall project the deposed President to this infinitely distant space; but a shock of nature of so vast an energy and for so great a result on him might unsettle even the footing of the firm members of Congress. We certainly need not resort to so perilous a method as that. How shall we accomplish it? Why, in the first place, nobody knows where that space is but the learned manager himself, and he is the necessary deputy to execute the judgment of the court. [Laughter.]

Let it then be provided that in case of your sentence of deposition and removal from office the honorable and astronomical manager shall take into his own hands the execution of the sentence. With the President made fast to his broad and strong shoulders, and, having already essayed the flight by imagination, better prepared than anybody else to execute it in form, taking the advantage of lad-

ders as far as ladders will go to the top of this great Capitol, and spurning then with his foot the crest of Liberty, let him set out upon his flight, [laughter,] while the two houses of Congress and all the people of the United States shall shout "*Sic itur ad astra.*" [Laughter.]

But here a distressing doubt strikes me; how will the manager get back? [Laughter.] He will have got far beyond the reach of gravitation to restore him, and so ambitious a wing as his could never stoop to a downward flight. Indeed, as he passes through the constellations, that famous question of Carlyle by which he derides the littleness of human affairs upon the scale of the measure of the heavens, "What thinks Bœotes as he drives his dogs up the zenith in their race of sidereal fire?" will force itself on his notice. What, indeed, would Bœotes think of this new constellation? [Laughter.]

Besides, reaching this space, beyond the power of Congress even "to send for persons and papers," [laughter,] how shall he return, and how decide in the contest, there become personal and perpetual, the struggle of strength between him and the President? [Laughter.] In this new revolution, thus established forever, who shall decide which is the sun and which is the moon? Who determine the only scientific test which reflects the hardest upon the other? [Laughter.]

If I have been successful at all in determining the general latitude of the imputed offence as not bringing it, under the circumstances which this evidence attaches to it, to the quality and grade of impeachable offences, I may now be prepared, and I hope with some commendable brevity, to notice what I yet regard as important to the course of my argument, and what I assigned as the second topic of it, to show that all else is political; but I wish to draw your attention also to what I think is a matter of great moment, a matter of great concern and influence for all statesmen, and for all lovers of the Constitution and of the country—to the particular circumstances under which the two departments of the government now brought in controversy are placed. I speak not of persons, but of the actual constitutional possession of the two departments.

The office of President of the United States, in the view of the framers of the Constitution, and in the experience of our national history, and in the esteem of the people, and in the ambition of all who aspire to that great place by worthy means, is an office of great trust and power. It has great powers. They are not monarchical or tending to monarchy, because the tenure of the office, its source of original commission, and its return of the trust to those who control it, and its amenability under the Constitution to this process of impeachment and the authority of Congress, save it from being at all dangerous to the liberties of the nation. Yet it is, and is intended to be, an office of great authority, and the Constitution in its co-ordinate department cannot be sustained without maintaining all the authority that the Constitution has intended for this executive office. But it depends for its place in the Constitution upon the fact, the practical fact, that its authority is committed by the suffrage of the people, and that when this authority is exerted it is not by individual purpose or will, or upon the mere strength which a single individual can oppose to the collective power of the Congress of the United States. It is because and as the people, who by their suffrage have raised the President to his place, are behind him, holding up his hands, speaking with his voice, sustaining him in his high duties, that the President has the place and can maintain it under the Constitution.

This great power is safe then to the people for the reasons I have stated, and it is safe to the President because the people are behind him and have just exhibited their confidence by the suffrage that has promoted him. When, however, alas, our Constitution comes to this trial that one is lifted to the presidential office who has not received the suffrage of the people for that office, then at once discord, dislocation, deficiency, difficulty show themselves; then at once the great

powers of the office which were consonant with a free constitution and with the supremacy of popular will, by the fact that for a brief term the breath of life of the continuing favor of the people gave them efficacy and strength, find no support in fact. Then it is that in the criticisms of the press, in the estimates of public men, in the views of the people, these great powers, strictly in trust and within the Constitution, seem to be despotic and personal. And then, if we will give due force to another difficulty that our system of vicious politics has introduced, and that is that in the nomination for the two offices, selecting always the true leader of the popular sentiment of the time for the place of President, we look about for a candidate for the Vice-Presidency to attract minority and to assuage differences, and to bring in inconsistent support, and make him different from the President in political position and in general circumstances for popular support, and couple with the fact that I have spoken of in the Constitution, and which belongs to it, this vice in our politics, then when the Vice-President becomes President of the United States, not only is he in the attitude of not having the popular support for the great powers of the Constitution, but he is in the condition of not having the party support for the fidelity and maintenance of his authority that are necessary. Then, adhering to his original opinions, to the very opinions and political attitude which form the argument for placing him in the second place of authority, he is denounced as a traitor to his party, and is watched and criticised by all the leaders of that party.

I speak not particularly in reference to the present presidential term and its incumbent, and the actual condition of politics here; I speak of the very nature of the case. All the public men, all the ambitious men, nay, all the men interested in the public service, in carrying on the government for the purposes and with the views, in the interest of duty, of the party, have made their connections, and formed their views, established their relations with the President who has disappeared. They then are not in the attitude of support, personal or political, that may properly be maintained among the leaders of a party, and that is implied in the fact that an election has taken place by the joint efforts, crowning in the final result the President of the selection of the people. Then it is that high words are interchanged. Then it is that ambitious men, who had framed their purposes, both for the present and for the future, upon the footing of the presidential predomination that had been secured by the election, find these plans dislocated and disturbed; and then it is that if wisdom and prudence and the personal qualities of pacification and of accommodation and of attraction are wanting upon the one side and the other, terrible evils threaten the conduct of the government and the peace of the state. It was thus, as we all know by looking back to the experience of the whig party, that differences, even in times of peace and of quiet, had been urged so far in the presidency of Mr. Tyler, that an impeachment was moved against him in the House of Representatives, and had more than one hundred supporters; and yet when it was all over, nobody, I think, could have dreamed that there was anything in the conduct of Mr. Tyler, in the matter complained of, that was just ground for impeachment. So, too, in great part during the incumbency of Mr. Fillmore, elevated to the presidency, his action and his course, tempered and moderated as it was by some of the personal qualities that I have stated, was yet carried on in resistance to the leading ideas of the party that had raised him to power.

Then the opposition, seizing upon this opportunity, encourage the controversy, urge on the quarrel, but do not espouse it, and thus it ends in the President being left without the support of the currents of authority that underlie and vivify the Constitution of the United States—the favor of the people; and so when this unfortunate, this irregular condition of the executive office concurs with times of great national juncture, of great and serious oppression and difficulty of public affairs, then at once you have at work the special, the peculiar, the irregular operation of forces that expose the Constitution, left unprotected

and undefended with the full measure of support that every department of the government should have to resist the other, pressing on to dangers and to difficulties that may shake and bring down the pillars of the Constitution itself.

I suggest this to you as wise men, to understand how out of circumstances, for which no man is responsible, attributable to the working of the Constitution itself, in this effort to provide a successor, and to the inattention paid to it in the suffrages of the people and the selections of the politicians, how there is a weakness, and a special weakness, that the presidency is, as it were, an undefended fort, and see to it that the invasion is not urged and made successful by the temptation thus presented.

This exception, weakness of the presidency under our Constitution, is encountered in the present state of affairs by an extraordinary development of party strength in the Congress. There are in the Constitution but three barriers against the will of a majority of Congress within the terms of their authority. One is that it requires a two-thirds vote to expel a member of either house; another that a two-thirds vote is necessary to pass a law over the objections of the President; and another, that a two-thirds vote of the Senate, sitting as a court for the trial of impeachment, is requisite to a sentence. And now how have these two last protections of the executive office disappeared from the Constitution in its practical working by the condition of parties that has given to one the firm possession by a three-fourths vote, I think in both houses, of the control of the action of each body of the legislature? Reflect upon this. I do not touch upon the particular circumstance that the non-restoration of the southern States has left your numbers in both houses of Congress than they might under other circumstances be. I do not calculate whether that absence diminishes or increases the disproportion that there would be. Possibly their presence might even aggravate the political majority which is thus arrayed and thus overrides practically all the calculations of the presidential protection through the guarantees of the Constitution; for, what do the two-thirds provisions mean? They meant that in a free country, where elections were diffused over a vast area, no congressman having a constituency of over seventy or eighty thousand people, it was impossible to suppose that there would not be a somewhat equal division of parties, or impossible to suppose that the excitements and zeal of party could carry all the members of it into any extravagance. I do not call them extravagances in any sense of reproach; I merely speak of them as the extreme measures that parties in politics, and under whatever motives, may be disposed to adopt.

Certainly, then, there is ground to pause and consider before you bring to a determination this great struggle between the co-ordinate branches of the government, this agitation and this conclusion in a certain event of the question whether the co-ordination of the Constitution can be preserved. Attend to these special circumstances and determine for yourselves whether under these influences it is best to urge a contest which must operate upon the framework of the Constitution, and its future unattended by any exceptions of a peculiar nature that govern the actual situation. Ah, that is the misery of human affairs, that the stress comes and has its consequence when the system is least prepared to receive it. It is the misery that disease, casual, circumstantial, invades the frame when health is depressed and the powers of the constitution to resist it are at the lowest ebb. It is that the gale rises and sweeps the ship to destruction when there is no sea-room for it and when it is upon a lee-shore. And if concurrent with that danger to the good ship her crew be short, her helm unsettled, and disorder begins to prevail, there comes to be a final struggle for the maintenance of mastery against the elements and over the only chances of safety, how wretched is the condition of that people whose fortunes are embarked in that ship of state!

What other protection is there for the presidential office than these two-thirds

Digitized by Google

guarantees of the Constitution that have disappeared? The Supreme Court placed there to determine, among the remarkable provinces of its jurisdiction, the lines of separation and of duty and of power under our Constitution between the legislature and the President. Ah! under this evidence, received and rejected, the very effort of the President was, when the two-thirds majorities had urged the contest against him, to raise a case for the Supreme Court to decide; and then the legislature, coming in by its special condition of impeachment, intercepts the effort, and brings his head again within the mere power of Congress, where the two-thirds rule is equally ineffectual as between the parties to the contest.

This is matter of grave import, of necessary consideration, and which, with the people of this country, with watchful foreign nations, and in the eyes of history, will be one of the determining features of this great controversy; for great as is the question in the estimate of the managers or of ourselves or of the public intelligence of this people, of how great the power should be on one side or the other, with Congress or with the President, that question sinks into absolute insignificance compared with the greater and higher question, the question that has been in the Constitution, that has been in the minds of philosophers, of publicists, and of statesmen since it was founded, whether it was in the power of a written constitution to draw lines of separation and put up buttresses of defence between the co-ordinate branches of the government? And with that question settled adversely with a determination that one can devour, and having the power, will devour the other, then the balances of the American Constitution are lost and lost forever. Nobody can reinstate in paper what has once been struck down in fact. Mankind are governed by instances, not by resolutions.

And then, indeed, there is placed before the people of this country either despair at the theory of paper constitutions, which have been derided by many foreign statesmen, or else an attempt to establish new balances of power by which, the poise of the different departments being more firmly placed, one can be safe against the other. But who can be wiser than our fathers? Who can be juster than they? Who can be more considerate or more disinterested than they? And if their descendents have not the virtue to maintain what they so wisely and so nobly established, how can these same descendents hope to have the virtue and the wisdom to make a better establishment for their posterity?

Nay, senators, I urge upon you to consider whether you will not recoil from settling so tremendous a subject under so special, so disadvantageous, so disastrous circumstances as I have portrayed to you in the particular situation of these branches of the government. A stronger Executive, with an absolute veto, with a longer term, with more permanent possession and control of official patronage, will be necessary for the support of this executive department, if the wise and just and considerate measure of our ancestors shall not prove, in your judgment, sufficient; or, if that be distasteful, if that be unacceptable, if that be inadmissible, then we must swing it all over into the omnipotence of Congress, and recur to the exploded experiment of the confederation, where Congress was executive and legislative, all in one.

There is one other general topic, not to be left unnoticed for the very serious impression that it brings upon the political situation which forms the staple—I must say it—of the pressure on the part of the managers to make out a crime, a fault, a danger that should enlist your action in the terrible machinery of impeachment and condemnation. I mean the very peculiar political situation in the country itself and in the administration of this government over the people of the country, which has been the womb from which has sprung this disorder and conflict between the departments of the government. I can, I think, be

Digitized by Google

quite brief about it, and certainly shall not infringe upon any of the political proprieties of the occasion.

The suppression of an armed rebellion and the reduction of the revolted States to the power of the government, when the region and the population embraced in the rebellion were so vast, and the head to which the revolt had come was so great, and the resistance so continuous, left a problem of as great difficulty in human affairs as was ever proposed to the actions of any government. The work of pacification would have been a severe task for any government after so great a struggle, when so great passions were enlisted, when so great wounds had been inflicted, when so great discontents had urged the controversy, and so much bitterness had survived its formal settlement; but wonderful to say, with his situation so difficult as to surpass almost the powers of government as exhibited in any former instance in the history of the world, there occurred a special circumstance that by itself would have tasked all the resources of statesmanship under even a simple government. I mean the emancipation of the slaves, which had thrown 4,000,000 of human beings, not by the processes of peace, but by the sudden blow of war, into the possession of their freedom, which had changed at once, against their will, the relation of all the rest of the population to these men that had been their slaves.

The process of adaptation of society and of law to so grave a social change as that, even when accomplished in peace, and when not disturbed by the operations of war and by the discontents of a suppressed rebellion, are as much as any wisdom or any courage, or any prosperity that is given to government, can expect to ride through in safety and peace. When, then, these two great political facts concur and press upon the government that is responsible for their conduct, how vast, how difficult, how intractable and unmanageable seems the posture!

But this does not represent the measure or even the principal feature of the difficulty. When the government whose arms have triumphed and suppressed resistance is itself, by the theory and action of the Constitution, the government that by peaceful law is to maintain its authority, the process is simple; but under our complex government, according to the theory and the practice, the interests and the feelings, the restored Constitution surrenders their domestic affairs at once to the local governments of the people who have been in rebellion. And then arises what has formed the staple of our politics for the last four years, what has tried the theory, the wisdom, the courage, the patriotism of all. It is, how far under the Constitution as it stands the general government can exercise absolute control in the transition period between war and absolute restored peace, and how much found to be thus unmanageable shall be committed to changes of the Constitution. And when we understand that the great controversy in the formation of the Constitution itself was how far the general government should be intrusted with domestic concerns, and when the final triumph and the general features of the Constitution that the people of the States were not willing, in the language of Mr. Ellsworth, to intrust the general government with their domestic interests, we see at once how wide, how dangerous, how difficult the arena of controversy of constitutional law and of difference of opinion as to what was or is constitutional, and if it be not of what changes shall be or ought to be made in the Constitution to meet the practical situation.

Then when you add to this that as people divide on these questions, and as the practical forces on one side and the other are the loyal masses and the rebel masses, whoever divides from his neighbor, from his associate, from his party adherents in that line of constitutional opinion and in that line of governmental action, which seems to press least changes upon the Constitution and least control upon the masses lately in rebellion, will be suspected and charged and named and called an ally of traitors and rebels, you have at once disclosed how

Digitized by Google

our dangerous politics have been brought to the head in which these names of "traitor" and of "rebel," which belong to war, have been made the current phrases of political discussion.

I do not question the rectitude nor do I question the wisdom of any positions that have been taken as matter of argument or as matter of faith or as matter of action in the disposition of this peculiar situation. I only attract your attention to the necessities and dangers of the situation itself. We were in the condition in which the question of the surrender to the local communities of their domestic affairs, which the order of the Constitution had arranged for the peaceful situation, became impossible without the gravest dangers to the state both in respect to the public order and in respect to this changed condition of the slave.

In English history the Commons were urged, after they had rejected the king from the British constitution and found the difficulty of making things work smoothly, *stare super antiquas vias;* but, said Sergeant Maynard, "It is not the question of standing upon the ancient ways, for we are not on them." The problem of the Constitution is, as it was then, how to get upon the ancient ways from these paths that disorder and violence and rebellion had forced us into; and here it was that the exasperations and the exacerbations of politics came up mingling with charges of infidelity to party and with treason, moral treason, political treason, I suppose, to the state. How many theories did we have?

In this Senate, if I am not mistaken, one very influential and able and eloquent senator was disposed to press the doctrines of the Declaration of Independence into being working forces of our constituted liberty, and a sort of pre-constitutional theory was adopted to suit the logical and political difficulties of the case. In another House a great leader was disposed to put it upon the trans-constitutional necessities that the situation itself imposed in perfect peace as in absolute and flagrant war. And thus it was that minds trained in the old school, attached to the Constitution, unable as rhetoricians or as reasoners to adopt these learned phrases and these working theories of preconstitutional or trans-constitutional authority and obligation, were puzzled among the ruins of society that the war had produced; and thus, as it seems to me, we find these concurring dangers leading ever to an important and necessary recognition, by whoever has to deal with them, of the actual and practical influences that they have upon the controversy.

And now let me urge here that all this is within the province of politics; and a free people are unworthy of their freedom and cannot maintain it if their public men, their chosen servants, are not able to draw distinctions between legal and constitutional offence and odious or even abominable politics. Certainly it is so. *Idem sentire de republicâ*, to agree in opinion concerning the public interest is the bond of one party, and diversity from those opinions the bond of the other; and where passions and struggles of force in any form of violence or of impeachment as an engine of power come into play, then freedom has become license, and then party has become faction, and those who do not withhold their hand until the ruin is accomplished will be subject to that judgment that temperance and fortitude and patience were not the adequate qualities for their conduct in the situation in which they were placed. Oh, why not wise enough to stay the pressure till adverse circumstances shall not weigh down the state? Why not in time remember the political wisdom—

> Beware of desperate steps. The darkest day,
> Live till to-morrow, will have passed away.

I hold in my hand an article from the Tribune, written under the instructions of this trial and put with great force and skill. I do not propose to read it. I bring it here to show and to say that it is an excellent series of articles of impeachment against the President of the United States within the forum of politics for political repugnancy and obstruction, and an honest confession that

the technical and formal crimes included in these articles are of very paltry consideration. That is an excellent article of impeachment, demanding by process suitable to the forum, an answer; and for the discussions of the hustings and of the election, there it belongs; there it must be kept. But this being a court, we are not to be tried for that in which we are not inculpated. How wretched the condition of him who is to be thus oppressed by a vague, uncertain shadow which he cannot oppose or resist! If the honorable managers will go back to the source of their authority, if they will obtain what was once denied them, a general and open political charge, it may, for aught I know, be maintainable in law; it may be maintainable in fact; but then it would be brought here; it would be written down; its dimensions would be known and understood; its weight would be estimated; the answer could be made.

And then your leisure and that of the nation being occupied with hearing witnesses about political differences and the question of political repugnance and obstructions upon the side of the President, those who should be honored with his defence in that political trial would at least have the opportunity of reducing the force of the testimony against them, and of bringing opposing and contravening proofs; and then, at least, if you would have a political trial, you would have it with name and with substance to rest upon. But the idea that a President of the United States is to be brought into the procedure of this court by a limited accusation, found "not guilty" under that, and convicted on an indictment that the House refused to sustain, or upon that wider indictment of the newspaper press, and without an opportunity to bring proof or to make arguments on the subject, seems to us too monstrous for any intelligence within or without this political circle, this arena of controversy, to maintain for a moment.

I may hope, somewhat briefly, to draw your attention to what lies at the basis of the discussion of the power and authority that may be rightfully exercised or reasonably be assumed in the action of the President to be exercised, even if it should prove erroneous within the premises of this matter between the two branches of the government.

The co-ordination of the powers of government is not only the greatest effort in the frame of a written constitution, but I think it must be conceded that as it occupies the main portion of the Constitution itself, so it has been regarded by all competent critics, at home and abroad, to have been a work most successfully accomplished by the framers of our government. Indeed, if you will look at the Constitution, you will find that beyond that very limited though very important service, of dividing what belongs to government and what shall be left to the liberties of the people, and then discriminating between what shall be accorded to the general government and what shall be left to the domestic governments of the States, the whole service of the Constitution is to build up these three departments of the government so that they shall have strength to stand as against the others, and not strength to encroach or overthrow.

Much has been said about Congress as being the great repository of power. Why, of course it is. It is the repository of power and of will, and there is not any difficulty in making Congress strong enough. Congress, that must be intrusted with all the strings of power and furnished with all its resources, the effort of the Constitution is to curb and restrain; and so you will find that almost all the inhibitions of the Constitution are placed upon Congress—upon Congress in withholding it from power over the people; from Congress in withholding it from power over the States; from Congress in withholding it from power over the co-ordinate branches; and, nevertheless, by a necessary and absolute deposit of authority in Congress, it is left master of the whole. This power of Parliament in the British constitution makes the Commons masters of the government. To what purpose is it to provide that the justices of the Supreme Court shall hold their tenure for life, and that their salaries shall not be diminished during the term of their service, when Congress, by an undoubted constitutional

power, may omit and refuse to appropriate one dollar to the support of any particular justice during any particular year or series of years? Nevertheless, the government is to be administered by men, and in an elective government the trust is that the selected agents of the people will be faithful to their interest and will be endowed with sufficient intelligence to protect them.

But simple as is the constitution of the judiciary, and needing no care, when you come to the executive authority arises the problem which has puzzled, does puzzle, will puzzle all framers of government having no source and no ideas of authority except what springs from the elective suffrage. You have the balance of the British constitution between the Crown and the Parliament, because it rests upon ideas and traditions and experience which have framed one portion of the government as springing up from the people and in their right, and the other portion of the government as descending from Divine authority and in its right; and you have no difficulty in enlarging, confirming, and bracing up the authority of Parliament, provided you leave standing the authority and majesty of the throne. But here the problem is, how, without the support of nobility, of the fountain of honor, of time, of strength, of inheritance, how under a suffrage and for a brief period to make an executive that is strong enough to maintain itself against the contentions of the Constitution.

Under these circumstances, and adjusting the balance as it is found in the Constitution, our ancestors disposed of the question. It has served us to this time. Sometimes, in the heat of party, the Executive has seemed too strong; sometimes, in the heat of party, Congress has seemed too strong; yet every contest and every danger passes away, managed, administered, controlled, protected by the great, superior, predominant interest and power of the people themselves. And the essence of the Constitution is, that there is no period granted by it of authority to the Senate in their six years' term, to the President in his four years' term, to the House of Representatives in their two years' term, no period that cannot be lived through in patience subordinate and obedient to the Constitution; and that, as was said in the debate which I read from the convention, applied to the particular topic of impeachment, there will be no danger when a four years' recurring election restores to the common master of Congress and the Executive the trust reposed, that there will be a temptation to carry for political controversy and upon political offence the sword of the Constitution, and make it peremptory and final in the destruction of the office.

I beg leave, in connection with this subject, its delicacy, its solicitudes in the arrangement of constitutional power, to read two passages from a great statesman, whose words when he was alive were as good as anybody's, and since his death have not lost their wisdom with his countrymen; I mean Mr. Webster. In his debate upon the Panama mission he said, in speaking of the question of the confidence of Congress in the Executive:

> This seems a singular notion of confidence, and certainly is not my notion of that confidence which the Constitution requires one branch of the government to repose in another. The President is not our agent, but, like ourselves, the agent of the people. They have trusted to his hands the proper duties of his office; and we are not to take those duties out of his hands from any opinion of our own that we should execute them better ourselves. The confidence which is due from us to the Executive and from the Executive to us is not personal, but official and constitutional. It has nothing to do with individual likings or dislikings: but results from that division of power among departments and those limitations on the authority of each which belong to the nature and frame of our government. It would be unfortunate, indeed, if our line of constitutional action were to vibrate backward and forward according to our opinions of persons, swerving this way to-day from undue attachment, and the other way to-morrow from distrust or dislike. This may sometimes happen from the weakness of our virtues or the excitement of our passions; but I trust it will not be coolly recommended to us as the rightful course of public conduct. (Webster's Works, vol. 3, p. 187.)

Again, in his speech on the presidential protest in the Senate in 1834, he said:

> The first object of a free people is the preservation of their liberty, and liberty is only to

Digitized by Google

be preserved by maintaining constitutional restraints and just division of political power. Nothing is more deceptive or more dangerous than the pretence of a desire to simplify government. The simplest governments are despotisms; the next simplest, limited monarchies; but all republics, all governments of law, must impose numerous limitations and qualifications of authority and give many positive and many qualified rights. In other words, they must be subject to rule and regulation. This is the very essence of free political institutions. The spirit of liberty is, indeed, a bold and fearless spirit; but it is also a sharp-sighted spirit; it is a cautious, sagacious, discriminating, far-seeing intelligence; it is jealous of encroachment, jealous of power, jealous of man. It demands checks; it seeks for guards; it insists on securities; it intrenches itself behind strong defences, and fortifies itself with all possible care against the assaults of ambition and passion. It does not trust the amiable weaknesses of human nature, and, therefore, it will not permit power to overstep its prescribed limits, though benevolence, good intent, and patriotic purpose come along with it. Neither does it satisfy itself with flashy and temporary resistance to illegal authority. Far otherwise. It seeks for duration and permanence; it looks before and after; and, building on the experience of ages which are past, it labors diligently for the benefit of ages to come. This is the nature of constitutional liberty; and this is our liberty, if we will rightly understand and preserve it. Every free government is necessarily complicated, because all such governments establish restraints, as well on the power of government itself as on that of individuals. If we will abolish the distinction of branches, and have but one branch; if we will abolish jury trials, and leave all to the judge; if we will then ordain that the legislator shall himself be that judge; and if we will place the executive power in the same hands, we may readily simplify government. We may easily bring it to the simplest of all possible forms, a pure despotism. But a separation of departments, so far as practicable, and the preservation of clear lines of division between them, is the fundamental idea in the creation of all our constitutions; and, doubtless, the continuance of regulated liberty depends on maintaining these boundaries. (Webster's Works, vol. 4, p. 122.)

I think I need to add nothing to these wise, these discriminating, these absolute and peremptory instructions of this distinguished statesman. The difficulty and the danger are exactly where this government now finds them, in the withholding of the strength of one department from working the ruin of another.

Mr. CONKLING. Mr. President, I move an adjournment for the day.

The motion was agreed to; and the Senate, sitting for the trial of the impeachment, adjourned.

THURSDAY, *April* 30, 1868.

The Chief Justice of the United States took the chair.

The usual proclamation having been made by the Sergeant-at-arms,

The managers of the impeachment on the part of the House of Representatives and the counsel for the respondent, except Mr. Stanbery and Mr. Curtis, appeared and took the seats assigned to them respectively.

The members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

The journal of yesterday's proceedings of the Senate, sitting for the trial of the impeachment, was read.

The CHIEF JUSTICE. The first business in order is the motion of the senator from Massachusetts, [Mr. Sumner,] which the Secretary will read.

The chief clerk read as follows:

Whereas Mr. Nelson, one of the counsel for the President, in addressing the Senate, has used disorderly words, as follows, namely: beginning with personalities directed to one of the managers he proceeded to say: "So far as any question that the gentleman desires to make of a personal character with me is concerned, this is not the place to make it. Let him make it elsewhere if he desires to do it;" and whereas such language, besides being discreditable to these proceedings, is apparently intended to provoke a duel or to signify a willingness to fight a duel, contrary to law and good morals: Therefore,

Ordered, That Mr. Nelson, one of the counsel of the President, has justly deserved the disapprobation of the Senate.

Mr. JOHNSON. Mr. Chief Justice, I move to lay the resolution on the table.

Digitized by Google

Mr. SUMNER. On that I ask for the yeas and nays.

The yeas and nays were ordered; and the chief clerk called Mr. Anthony's name.

Mr. ANTHONY. Before voting on this I should like to propose a question to the counsel, and I will do it in writing, or, if the Senate will allow me, I will do it verbally.

The CHIEF JUSTICE. If there is no objection the senator from Rhode Island can propose a question.

Mr. ANTHONY. I wish to ask of the counsel if, in the remark which has been quoted in the resolution, it was his intention to challenge the manager alluded to to a mortal combat?

Mr. NELSON. It is a very difficult question for me to answer. During the recess of the Senate the day before yesterday the honorable gentleman [Mr. Manager Butler] remarked to me that he was going to say something upon the subject of Alta Vela, and desired me to remain. When the gentleman read his remarks to the Senate I regarded them as charging me with dishonorable conduct before the Senate, and in the heat of the discussion I made use of language which was intended to signify that I hurled back the gentleman's charge upon him, and that I would answer that charge in any way in which the gentleman desired to call me to account for it. I cannot say I had particularly the idea of a duel in my mind, as I am not a duelist by profession; but, nevertheless, my idea was that I would answer the gentleman in any way in which he chose to call upon me for it. I did not intend to claim any exemption on account of age or any exemption on account of other things that are apparent to the Senate. That was all that I meant to signify, and I hope the Senate will recollect the circumstances under which this thing was done. The Senate has treated me and every other gentleman concerned in this case with the utmost kindness and politeness, and has given marked attention to what we have said, and the idea of insulting the Senate is a thing that never entered my mind. I had no such thought or design. I entertain the kindest feelings and the most respectful feelings towards the Senate, and would be as far as any man upon the face of the earth from saying anything which would justly give offence to the gentlemen of the Senate whom I was addressing.

Mr. SUMNER. Mr. President, I ask that the resolution be read again.

The chief clerk read the resolution.

The CHIEF JUSTICE. The Secretary will proceed with the call of the roll on the motion to lay on the table.

The question being taken by yeas and nays, resulted—yeas, 35; nays, 10; as follows:

YEAS—Messrs. Anthony, Bayard, Buckalew, Cattell, Chandler, Corbett, Cragin, Davis, Dixon, Doolittle, Drake, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Harlan, Hendricks, Howe, Johnson, Morrill of Maine, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ramsey, Ross, Saulsbury, Sherman, Tipton, Trumbull, Van Winkle, Vickers, and Williams—35.

NAYS—Messrs. Cameron, Howard, Morgan, Morrill of Vermont, Pomeroy, Stewart, Sumner, Thayer, Wilson, and Yates—10.

NOT VOTING—Messrs. Cole, Conkling, Conness, Henderson, McCreery, Nye, Sprague, Wade, and Willey—9.

So the resolution was laid upon the table.

The CHIEF JUSTICE. The next business in order is the order proposed by the senator from Pennsylvania, [Mr. Cameron,] which the Secretary will read.

The chief clerk read as follows:

Ordered, That the Senate, sitting as a court of impeachment, shall hereafter hold night sessions, commencing at 8 o'clock p. m. to-day, and continuing until 11 o'clock p. m., until the arguments of the counsel for the President and of the managers on the part of the House of Representatives shall be concluded.

Digitized by Google

Mr. SUMNER. I move to strike out all after the word "ordered," and insert what I send to the Chair.

The CHIEF JUSTICE. The words proposed to be inserted will be read.

The chief clerk read as follows:

That the Senate will sit during the remainder of the trial from 10 o'clock in the forenoon to 6 o'clock in the afternoon, with such brief recess as may be ordered.

Mr. SUMNER. On that I should like to have the yeas and nays.

Mr. TRUMBULL. Mr. President, I move to lay this whole subject on the table.

Mr. SUMNER. On that I ask for the yeas and nays.

The yeas and nays were ordered; and being taken, resulted—yeas, 32; nays, 17; as follows

YEAS—Messrs. Anthony, Bayard, Buckalew, Cattell, Corbett, Davis, Dixon, Doolittle, Drake, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Hendricks, Howe, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ramsey, Ross, Saulsbury, Sprague, Trumbull, Van Winkle, Vickers, and Willey—32.

NAYS—Messrs. Cameron, Chandler, Conkling, Cragin, Edmunds, Harlan, Howard, Morgan, Pomeroy, Sherman, Stewart, Sumner, Thayer, Tipton, Williams, Wilson, and Yates—17.

NOT VOTING—Messrs. Cole, Conness, Henderson, Nye, and Wade—5.

So the order and amendment were laid upon the table.

The CHIEF JUSTICE. Mr. Evarts will proceed with the argument for the President.

Mr. EVARTS. We perceive, then, Mr. Chief Justice and Senators, that the subject out of which this controversy has arisen between the two branches of the government, executive and legislative, touches the very foundations of the balanced powers of the Constitution; and in the arguments of the honorable managers it has to some extent been so pressed upon your attention. You have been made to believe that so weighty and important is the point in controversy as to the allocation of the power over office included in the function of removal, that if it is carried to the credit of the executive department of this government it makes it a monarchy. Why, Mr. Chief Justice and Senators, what grave reproach is this upon the wisdom and foresight and civil prudence of our ancestors that have left unexamined and unexplored and unsatisfied these doubts or measures of the strength of the Executive as upon so severe a test or inquiry of being a monarchy or a free republic? I ask, without reading the whole of it, your attention to a passage from the Federalist, in one of the papers by Alexander Hamilton, who meets in advance these aspersions that were sought to be thrown upon the establishment of the executive power in a President. He there suggests in brief and solid discriminations the distinctions between the Presidency and a monarchy, and concludes by saying this:

What answer shall we give to those who would persuade us that things so unlike resemble each other? The same that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.

But a little closer attention both to the history of the framing of the Constitution and to the opinions that maintained a contest in the body of the convention, which should finally determine the general character and nature of the Constitution, will show us that this matter of the power of removal or the control of office, as disputable between the Executive and the Senate, touches more nearly one of the other great balances of the Constitution; I mean that balance between the weight of numbers in the people and the equality of States, irrespective of population, of wealth, and of size. Here it is, if I may be allowed to say so, that the opinions to which my particular attention was drawn by the honorable manager, [Mr. Boutwell,] the opinions of Roger Sherman, had their origin. One of the most eminent statesmen of the last generation said to me that it was to Mr. Sherman and to his younger colleague, Mr. Ellsworth, and to Judge Paterson, of New Jersey, that we owed it, more than to all else in that

Digitized by Google

convention, that our government was made what that statesman pronounced it to be, the best government in the world, a federal republic, instead of being what it would have been but for those members of the convention, as this same statesman of the last generation expressed it, a consolidated empire, the worst government in the world.

Between these two opinions it was that the controversy whether the Senate should be admitted into a share of the executive power of official appointment, the great arm and strength of the government came into play; and as a part of his firm maintenance of the equality of the States Mr. Sherman insisted that this participation should be accorded to the Senate; and others resisted as too great a subtraction from the sum of executive power to be capable safely of this distribution and frittering away. Mr. Adams, the first President of that name, I am informed upon authority not doubted, bringing it to me from the opinion of his grandson, died in the conviction that even the participation in appointment that the Constitution, as construed and maintained in the practice of this government, accorded to the Senate, would be the point upon which the Constitution would fail; that this attraction of power to comparatively irresponsible and unnoticed administration in the Senate would ultimately so destroy the strength of the Executive with the people and create so great discontent with the people themselves that the Executive of their own choice, upon the federal forces and numbers which the Constitution gives to that election, would not submit to the executive power thus bestowed being given to a body that had its constitution without any popular election whatever, and had its members and strength made up not by the wealth and power and strength of the people, but by the equality of the States.

When you add to that this change which gives to the Senate a voice in the removal from office, and thus gives them the first hold upon the question of the maintenance of official power in the country, you change wholly the question of the Constitution; and instead of giving the Senate only the advisory force which that instrument commits to it, and only under the conditions that the office being to be filled they have nothing to say but who shall fill it, and if they do not concur, still leave it to the Executive to name another, and another, and another, always proceeding from his original and principal motion in the matter, you change it to the absolute preliminary power of this body to say to the Executive of the United States that every administrative office under him shall remain as it is; and these officers shall be over him and against him, provided they be with and for you; and when you add to that the power to say "until we know and determine who the successor will be, until we get the first move by the Executive's concession to us of the successor, we hold the reins of power that the office shall not be vacated," you do indeed break down at once the balance between the executive and the legislative power as represented in this body of the latter department of the government, and you break down the federal election of President at once, and commit to the equality of States the partition and distribution of the executive power of this country.

I would like to know how it is that the people of this country are to be made to adopt this principle of their Constitution that the executive power attributed to the federal members, made up of senators and representatives added together for each State, is to go through the formality of the election of a President upon that principle and upon that calculation, and then find that the executive power that they supposed was involved in that primary choice and expression of the public will is to be administered and controlled by a body made up of the equality of States. I would like to know on what plan our politics are to be carried on; how can you make the combinations, how the forces, how the interests, how the efforts that are to throw themselves into a popular election to raise a presidential control of executive power, and then find that that executive power is all administered on the principle of equality of States. I would like

Digitized by Google

to know how it is that New York and Pennsylvania, and Ohio and Indiana, and Illinois and Missouri, and the great and growing States, are to carry the force of popular will into the executive chair upon the federal numbers of the electoral colleges, and then find that Rhode Island and Delaware, and the distant States unpeopled, are to control the whole possession and administration of executive power. I would like to know how long we are to keep up the form of electing a President with the will of the people behind him, and then find him stripped of the power thus committed to him in the partition between the States, without regard to numbers or to popular opinion. There is the grave dislocation of the balances of the Constitution; there is the absolute destruction of the power of the people over the presidential authority, keeping up the form of an election, but depriving it of all its results. And I would like to know, if by law or by will this body thus assumes to itself this derangement of the balances of the Constitution as between the States and popular numbers, how long New England can maintain in its share of executive power, as administered here, as large a proportion as belongs to New York, to Pennsylvania, to Ohio, to Indiana, to Illinois, and to Missouri together.

I must think, Mr. Chief Justice and Senators, that there has not been sufficiently considered how far these principles thus debated reach, and how the framers of the Constitution, when they came to debate in the year 1789 in Congress what was or should be the actual and practical allocation of this authority, understood the question perfectly in its bearing and in its future necessities.

True, indeed, Mr. Sherman was always a stern and persistent advocate for the strength of the Senate as against the power of the Executive. It was there, on that point, that the Senate represented the equality of States; and he and Mr. Ellsworth, holding their places in the convention as the representatives of Connecticut, a State then a small State, between the powerful State of Massachusetts on the one side and New York on the other; and Judge Paterson, of New Jersey, the representative of that State, a small State, between the great State of New York on the one side and the great State of Pennsylvania on the other, were the advocates, undoubtedly, of this distribution of power to the Senate; and, as is well known in the history of the times, a correspondence of some importance took place between the elder Mr. Adams and Mr. Sherman, in the early days of the working of the government, as to whether the fears of Mr. Adams that the Executive would prove too weak, or the purposes of Mr. Sherman that the Senate should be strong enough, were or were not most in accord with the principles of the government. But all that was based upon the idea that the concurrence of the Senate, under the terms of the Constitution, in appointment, was the only detraction from the supremacy and independence of executive authority.

Now, this question comes up in this form: the power of removal is, and always has been, claimed and exercised by the Executive in this government, separately and independently of the Senate. Until the act of March 2, 1867, the actual power of removal by the Senate never has been claimed. Some constructions upon the affirmative exercise of the power of appointment by the Executive have at different times been suggested, and received more or less support, tending to the conclusion that thus the Senate might have some hold of the question of removals; and now this act, which we are to consider more definitely hereafter, does not assume in terms to give the Senate a participation in the distinct and separate act of an executive nature, the removal from office. Indeed, the manner that the Congress has dealt with the subject is quite peculiar. Unable, apparently, to find adequate support for the pretension that the Senate could claim a share in the distinct act of removal or vacating of office, the scheme of the law is to change the tenure of office, so that removability as a separate and independent governmental act, by whomever to be exerted, is obliterated from the powers of this government. Look at that, now, that you do

absolutely strike out of the capacity and resources of this government the power of removing an officer as a separate executive act; I mean an executive act in which you participate. You have determined by law that there shall be no vacation of an office possible, except when and as and by the operation of completely filling it. And so far have you carried that principle that you do not even make it possible to vacate it by the concurrence of the Senate and the President; but you have deliberately and firmly determined that the office shall remain full as an estate and possession of the incumbent, from which he can be removed under no stress of the public necessity except by the fact occurring of a complete appointment for permanent tenure of a successor concurred in by the Senate and made operative by the new appointee going into and qualifying himself in the office.

This seems at the first sight a very extraordinary provision for all the exigencies of a government like ours, with its 40,000 officers, whose list is paraded here before you, with their twenty-one millions of emoluments, to show the magnitude of the great prize contended for between the Presidency and the Senate. It is a very singular provision, doubtless, that in a government which includes under it 40,000 officers there should be no governmental possibility of stopping a man in or removing him from an office except by the deliberate succession of a permanent successor approved by the Senate and concurred in by the appointee himself going to the place and qualifying and assuming its duties.

I speak the language of the act, and while the Senate is in session there is not any power of temporary suspension or arrest of fraud or violence, of danger or menace, in the conduct of the subsisting officer. When you are in recess there is a power of suspension given to the Executive, and we are better off in that respect when you are in office than when you are in session, for we can, by a peremptory and definite and appropriate action, arrest misconduct by suspension. But as I said before, I repeat, under this act the incumbents of all these offices have a permanent estate until a successor, with your consent and his own, is inducted into the office.

I do not propose to discuss (as quite unnecessary to any decision of any matter to be passed on in your judgment) at any very great length the question of the constitutionality of this law. A very deliberate expression of opinion, after a very valuable and thorough debate, conducted in this body, in which the reasons on each side were ably maintained by your most distinguished members, and a very thorough consideration in the House of Representatives, where able and eminent lawyers, some of whom appear among the managers to-day, gave the country the benefit of their knowledge and their acuteness, have placed this matter upon a legislative judgment of constitutionality. But I think all will agree that a legislative judgment of constitutionality does not conclude a court, and that when legislative judgments have differed, and when the practice of the government for eighty years has been on one side and the new ideas introduced are confessedly of reversal and revolution in those ideas, it is not saying too much to say that after the expression of the legislative will, and after the expression of the opinion of the legislature implied in their action, there yet would remain for debate among jurists and lawyers, among statesmen, among thoughtful citizens, and certainly properly within the province of the Supreme Court of the United States, the question whether the one or the other construction of the Constitution, so vital in its influence upon the government, was the correct and the safe course for the conduct of the government.

Let me ask your attention for a moment upon two points, to the question as presenting itself to the minds of the senators, as to whether this was or was not a reversal and revolution in the practice and theories of the government, and also as to the weight of a legislative opinion. In the Senate, the senator from Oregon [Mr. Williams] said:

This bill undertakes to reverse what has heretofore been the admitted practice of the

Digitized by Google

government; and it seemed to me that it was due to the exalted office of the President of the United States, the Chief Magistrate of the nation, that he should exercise this power; that he should be left to choose his own cabinet, and that he should be held responsible, as he will be, to the country for whatever acts that cabinet may perform." (Congressional Globe, thirty-ninth Congress, second session, p. 384.)

This senator touches the very marrow of the matter, that when you are passing this bill, which in the whole official service of this country reverses the practice, you should at least leave the exception of the cabinet officers in. That was the point; leaving them entirely in, and that, with that exception in, it was a reversal of the practice of the government to all the rest, and the cabinet should be left as they were, because, as he said wisely, the country will hold the Executive responsible for what his cabinet does; and they will so hold him until they find out that you have robbed the Executive of all responsibility by robbing it of what is the pith of responsibility, discretion.

The same honorable senator proceeds, in another point of the debate:

I know there is room for disagreement of opinion; but it seemed to me that if we revolutionize the practice of the government in all other respects, we might let this power remain in the hands of the President of the United States—

That is, the cabinet officers' appointment—

that we ought not to strip him of this power, which is one that it seems to me it is necessary and reasonable that he should exercise. (Ibid., p. 384.)

The honorable senator from Michigan [Mr. Howard] says:

I agree with him—

Referring to the senator from Indiana [Mr. Hendricks:]

that the practical precedents of the government thus far lead to this interpretation of the Constitution, that it is competent for the President during the recess of the Senate to turn out of office a present incumbent, and to fill his place by commissioning another. This has been, I admit, the practice for long years and many generations; but it is to be observed, at the same time, that this claim of power on the part of the Executive has been uniformly contested by some of the best minds of the country. (Ibid., p. 407.)

And now, as to the weight of mere legislative construction, even in the mind of a legislator himself, as compared with other sources of authoritative determination, let me ask your attention to some other very pertinent observations of the honorable senator from Oregon [Mr. Williams:]

Those who advocate the executive power of removal rely altogether upon the legislative construction of the Constitution, sustained by the practice and opinions of individual men. I need not argue that the legislative construction of the Constitution has no binding force. It is to be treated with proper respect; but few constructions have been put upon the Constitution by Congress at one time that have not been modified or overruled at other or subsequent times, so that, so far as the legislative construction of the Constitution upon this question is concerned, it is entitled to very little consideration. (Ibid., p. 439.)

The point in the debate was that the legislative construction of 1789, as worked into the bones of the government by the indurating process of practice and exercise, was a construction of powerful influence on the matter; and yet the honorable senator from Oregon justly pushes the proposition that legislative construction *per se*—that I may not speak disrespectfully, I speak his words—"that legislative construction is entitled to very little consideration;" that it has "no binding force." Shall we be told that a legislative construction of March 2, 1867, and a practice under it for one year that has brought the Congress face to face with the Executive and introduced the sword of impeachment between the two branches upon a removal from office, raising the precise question that an attempt by the President to remove a Secretary and appoint an *ad interim* discharge of its duties is to result in a removal by the Senate of the Executive itself and the appointment of one of its own members to the *ad interim* discharge of the duties of the Presidency? That is the issue made by a recent legislative construction.

But the honorable senator from Oregon, with great force and wisdom, as it seems to me, proceeded in the debate to say that the courts of law, and, above

Digitized by Google

all, the Supreme Court of the United States, were the place to look for authoritative, for permanent determinations of these constitutional questions; and it will be found that in this he but followed the wisdom shown in the debate in 1789 and in the final result of it, in which Mr. Sherman concurred as much as any member of that Congress, that it was not for Congress to name or assign the limits upon executive power by enactment nor to appropriate and confer executive power by endowment through an act of Congress, but to leave it, as Mr. White, of North Carolina, said, and as Mr. Gerry, of Massachusetts, said, and as Mr. Sherman, of Connecticut, said, for the Constitution itself to operate upon the foreign secretary act, and let the action be made under it by virtue of a claim of right under the Constitution, and whoever was aggrieved let him raise his question in the courts of law. And upon that resolution and upon that situation of the thing the final vote was taken, and the matter was disposed of in that Congress; but it was then and ever since has been regarded as an authentic and authoritative determination of that Congress that the power was in the President, and it has been so insisted upon, so acted upon ever since, and nobody has been aggrieved, and nobody has raised the question in the courts of law. That is the force and the weight of the resolution of that first Congress and of the practice of the government under it.

In the House of Representatives, also, it was a conceded point in the debate upon this bill, when one of the ablest lawyers in that body, as I understand by repute, Mr. Williams, one of the honorable managers, in his argument for the bill, said:

> It aims at the reformation of a giant vice in the administration of this government by bringing its practice back from a rule of its infancy and inexperience. (Ibid., p. 18.)

He thought it was a faulty practice; but that it was a practice, and that from its infancy to the day of the passage of the bill it was a vice inherent in the system and exercising its power over its action, he did not doubt. He admits, subsequently, in the same debate that the Congress of 1789 decided, and their successors for three-quarters of a century acquiesced in this doctrine.

I will not weary the Senate with a thorough analysis of the debate of 1789. It is, I believe, decidedly the most important debate in the history of Congress. It is, I think, the best considered debate in the history of the government. I think it included among its debaters as many of the able men and of the wise men, the benefit of whose public service this nation has ever enjoyed, as any debate or measure that this government has ever entertained or canvassed. And it was a debate in which the civil prudence and forecast of the debaters manifested itself, whichever side they took of the question, in wonderful wisdom, for the premises of the Constitution were very narrow. Most probably the question of removal from office as a distinct subject had never occurred to the minds of men in the convention. The tenure of office was not to be made permanent, except in the case of the justices of the Supreme Court, and the periodicity of the House of Representatives, of the Senate, and of the Executive were fixed. Then there was an attribution of the whole inferior administrative official power of the government to the Executive as being an executive act, with the single qualification, exceptional in itself, that the advice and consent of the Senate should be interposed as a negative upon presidential nomination, carrying him back to a substitute if they should not agree on the first nominee.

The point raised was exactly this, and may be very briefly stated: those who, with Mr. Sherman, maintained that the concurrence in removals was as necessary as the concurrence in appointments, put themselves on a proposition that the same power that appointed should have the removal. That was a little begging of the question—speaking it with all respect—as to who the appointing power was really, under the terms and in the intent of the Constitution. But, conceding that the connection of the Senate with the matter really made them a part of the appointing power, the answer to the argument, triumphant as it

seems to me, as it came from the distinguished speakers, Mr. Madison, Mr. Boudinot, Fisher Ames, and other supporters of the doctrine that finally triumphed, was this: primarily the whole business of official subordinate executive action is a part of the executive function; that being attributed *in solido* to the President, we look to exceptions to serve the turn and precise measure of their own definition, and discard that falsest principle of reasoning in regard to laws or in regard to conduct, that exception is to breed exception or amplification of exception. The general mass is to lose what is subtracted from it by exception, and the general mass is to remain with its whole weight not thus separately and definitely reduced. When, therefore, these statesmen said you find the freedom of executive action and its solid authority reduced by an exception of advice and consent in appointment, you must understand that that is the limit of the exception, and the executive power in all other respects stands unimpaired.

What, then, is the test of the consideration? Whether removal from office belongs to the executive power, if the Constitution has not attributed it elsewhere; and then the question was of statesmanship, whether this debate was important, whether it was vital, whether its determination one way or the other did affect seriously the character of the government and its working; and I think all agreed that it did; and all so agreeing, and all coming to the resolution that I have stated, what weight, what significance is there in the fact that the party that was defeated in the argument submitted to the conclusion and to the practice of the government under it, and did not raise a voice or take a vote in derogation of it during the whole course of the government?

But it does not stand upon this. After forty-five years' working of this system, between the years 1830 and 1835, the great party exacerbations between the democracy, under the lead of General Jackson, and the whigs, under the mastery of the eminent men that then filled these halls, the only survivor of whom, eminent then himself and eminent ever since, now does me the honor to listen to my remarks, [referring to Hon. Thomas Ewing, of Ohio,] then under that antagonism there was renewed the great debate; and what was the measure which the contesting party, under the influence of party spirit, brought the matter to? Mr. Webster said while he led the forces in a great array, which, perhaps, for the single instance combined the triumvirate of himself, Mr. Calhoun, and Mr. Clay, that the contrary opinion and the contrary practice was settled. He said: "I regard it as a settled point; settled by construction, settled by precedent, settled by the practice of the government, settled by legislation;" and he did not seek to disturb it. He knew the force of those forty-five years, the whole existence of the nation under its Constitution upon a question of that kind; and he sought only to interpose a moral restraint upon the President in requiring him, when he removed from office, to assign the reasons of the removal.

General Jackson and the democratic party met the point promptly with firmness and with thoroughness, and in his protest against a resolution which the Senate had adopted in 1834, I think, that his action in the removal of Mr. Duane (though they brought it down finally, I believe, to the point of the removal of the deposits) had been in derogation of the Constitution and the laws, he met it with a defiance in his protest which brought two great topics of debate up; one the independence of the Executive in its right to judge of constitutional questions, and the other the great point that the conferring by choice of the people upon the President of their representation through federal numbers was an important part of the Constitution, and that he was not a man of his own will, but endued and re-enforced by the will of the people. That debate was carried on and that debate was determined by the Senate passing a vote which enacted its opinion that his conduct had been in derogation of the Constitution and the law; and on this very point a reference was made to the common master of them all, the people of the United States; and upon a re-election of General Jackson and upon a confirmation of opinion from the people themselves,

they in their primary capacity acting through the authentic changes of their government, by election, brought into the Senate, upon this challenge, a majority that expunged the resolution censuring the action of the Executive. You talk about power to decide constitutional questions by Congress, power to decide them by the Supreme Court, power to decide them by the Executive. I show you the superior power of all that has been drawn into the great debate, of public opinion and the determination of the suffrage, and I say that the history of free countries, the history of popular liberty, the history of the power of the people, not by passion or by violence, but by reason, by discretion and peaceful, silent, patient exercise of their power, was never shown more distinctly and more definitely than on this very matter, whether it is a part of the executive power of this country or of the legislative or senatorial power, that removal from office should remain in the Executive or be distributed among the senators. It was not my party that was pleased or that was triumphant, but of the fact of what the people thought there was not any doubt, and there never has been since until the new situation has produced new interests and resulted in new conclusions.

Honorable senators and representatives will remember how in the debate which led to the passage of the civil-tenure act it was represented that the authority of the first Congress or 1789 ought to be somewhat scrutinized because of the influence upon their debates and conclusions that the great character of the Chief Magistrate, President Washington, might have produced upon their minds. Senators, why can we not look at the present as we look at the past? Why can we not see in ourselves what we so easily discern as possible with others? Why can we not appreciate it that perhaps the judgment of senators and of representatives now may have been warped or misled somewhat by their opinions and feelings toward the Executive as it is now filled? I apprehend, therefore, that this matter of party influence is one that is quite as wise to consider, and this matter of personal power in authority of character and conduct is quite as suitable to be weighed when we are acting as when we are criticising the action of others.

Two passages I may be permitted to quote from this great debate as carried on in the Congress of 1789. One is from Mr. Madison, at page 480 of the first volume of the Annals of Congress:

> It is evidently the intention of the Constitution that the first magistrate should be responsible for the executive department. So far, therefore, as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to his country. Again, is there no danger that an officer, when he is appointed by the concurrence of the Senate, and has friends in that body, may choose rather to risk his establishment on the favor of that branch than rest it upon the discharge of his duties to the satisfaction of the executive branch, which is constitutionally authorized to inspect and control his conduct? And if it should happen that the officers connect themselves with the Senate, they may mutually support each other, and for want of efficacy reduce the power of the President to a mere vapor; in which case his responsibility would be annihilated, and the expectation of it unjust. The high executive officers, joined in cabal with the Senate, would lay the foundation of discord, and end in an assumption of the executive power, only to be removed by a revolution in the government. I believe no principle is more clearly laid down in the Constitution than that of responsibility.

Mr. Boudinot, (page 487,) says:

> Neither this clause [of impeachment] nor any other goes so far as to say it shall be the only mode of removal: therefore, we may proceed to inquire what the other is. Let us examine whether it belongs to the Senate and President. Certainly, sir, there is nothing that gives the Senate this right in express terms; but they are authorized, in express words, to be concerned in the appointment. And does this necessarily include the power of removal? If the President complains to the Senate of the misconduct of an officer, and desires their advice and consent to the removal, what are the Senate to do? Most certainly they will inquire if the complaint is well founded. To do this they must call the officer before them to answer. Who, then, are the parties? The supreme executive officer against his assistant; and the Senate are to sit as judges to determine whether sufficient cause of removal exists. Does not this set the Senate over the head of the President? But suppose they shall decide

in favor of the officer, what a situation is the President then in, surrounded by officers with whom, by his situation, he is compelled to act, but in whom he can have no confidence, reversing the privilege given him by the Constitution, to prevent his having officers imposed upon him who do not meet his approbation?

In these weighty words of Mr. Boudinot and Mr. Madison is found the marrow of the whole controversy. There is no escaping from it. If this body pursue the method now adopted, they must be responsible to the country for the action of the executive department; and if officers are to be maintained, as these wise statesmen say, over the head of the President, then that power of the Constitution which allowed him to have a voice in their selection is entirely gone; for I need not say that if it is to be dependent upon an instantaneous selection, and thereafter there is to be no space of repentance or no change of purpose on the part of the Executive as new acts shall develop themselves and new traits of character shall show themselves in the incumbent, it is idle to say that he has the power of appointment. It must be the power of appointment from day to day; that is the power of appointment for which he should be held responsible, if he is to be responsible at all. I wish to ask your attention to the opinions expressed by some of the statesmen who took part in this determination of what the effect, and the important effect, of this conclusion of the Congress of 1789 was. None of them overlooked its importance on one side or the other; and I beg leave to read from the life and works of the elder Adams, at page 448 of the first volume, the interesting comments of one, himself a distinguished statesman, in whom we all have confidence, Mr. Charles Francis Adams:

The question most earnestly disputed turned upon the power vested by the Constitution in the President to remove the person at the head of that bureau at his pleasure. One party maintained it was an absolute right. The other insisted that it was subject to the same restriction of a ratification by the Senate which is required when the officer is appointed. After a long contest in the House of Representatives, terminating in favor of the unrestricted construction, the bill came up to the Senate for its approbation.

This case was peculiar and highly important. By an anomaly in the Constitution, which, upon any recognized theory, it is difficult to defend, the Senate, which, in the last resort, is made the judicial tribunal to try the President for malversation in office, is likewise clothed with the power of denying him the agents in whom he may choose most to confide for the faithful execution of the duties of his station, and forcing him to select such as they may prefer. If, in addition to this, the power of displacing such as he found unworthy of trust had been subjected to the same control, it cannot admit of a doubt that the government must, in course of time, have become an oligarchy, in which the President would sink into a mere instrument of any faction that might happen to be in the ascendent in the Senate; this, too, at the same time that he would be subject to be tried by them for offences in his department, over which he could exercise no effective restraint whatever. In such case the alternative is inevitable, either that he would have become a confederate with that faction, and therefore utterly beyond the reach of punishment by impeachment at their hands for offences committed with their privity, if not at their dictation, or else, in case of his refusal, that he would have been powerless to defend himself against the paralyzing operation of their ill-will. Such a state of subjection in the executive head to the legislature is subversive of all ideas of a balance of powers drawn from the theory of the British constitution, and renders probable at any moment a collision, in which one side or the other, and it is most likely to be the legislature, must be ultimately annihilated.

Yet, however true these views may be in the abstract, it would scarcely have caused surprise if their soundness had not been appreciated in the Senate. The temptation to magnify their authority is commonly all-powerful with public bodies of every kind. In any other stage of the present government than the first it would have proved quite irresistible. But throughout the administration of General Washington there is visible among public men a degree of indifference to power and place which forms one of the most marked features of that time. More than once the highest cabinet and foreign appointments went begging to suitable candidates, and begged in vain. To this fact it is owing that public questions of such moment were then discussed with as much of personal disinterestedness as can probably ever be expected to enter into them anywhere. Yet even with all these favoring circumstances it soon became clear that the republican jealousy of a centralization of power in the President would combine with the *esprit du corps* to rally at least half the Senate in favor of subjecting removals to their control. In such a case the responsibility of deciding the point devolved, by the terms of the Constitution, upon Mr. Adams, as Vice-President. The debate was continued from the 15th to the 18th of July, a very long time for that day in an assembly comprising only twenty-two members when full, but seldom more than twenty in attendance. A very brief abstract, the only one that has yet seen the light, is furnished in the third

volume of the present work. Mr. Adams appears to have made it for the purpose of framing his own judgment in the contingency which he must have foreseen as likely to occur. The final vote was taken on the 18th. Nine senators voted to subject the President's power of removal to the will of the Senate: Messrs. Few, Grayson, Gunn, Johnson, Izard, Langdon, Lee, Maclay, and Wingate. On the other hand, nine senators voted against claiming the restriction: Messrs. Bassett, Carroll, Dalton, Elmer, Henry, Morris, Paterson, Read, and Strong. The result depended upon the voice of the Vice-President. It was the first time that he had been summoned to such a duty. It was the only time during his eight years of service in that place that he felt the case to be of such importance as to justify his assigning reasons for his vote. These reasons were not committed to paper, however, and can, therefore, never be known. But in their soundness it is certain that he never had the shadow of a doubt. His decision settled the question of constitutional power in favor of the President, and, consequently, established the practice under the government, which has continued down to this day. Although there have been occasional exceptions taken to it in argument, especially at moments when the executive power, wielded by a strong hand, seemed to encroach upon the limits of the co-ordinate departments, its substantial correctness has been, on the whole, quite generally acquiesced in. And all have agreed that no single act of the first Congress has been attended with more important effects upon the working of every part of the government.

It is thus that this was regarded at the time that the transaction took place. I beg now to call the attention of the Senate to the opinions of Fisher Ames, as expressed in letters written by him concurrently with the action of the Congress to his correspondent, an intelligent lawyer of Boston, Mr. George Richards Minot. In a letter to Mr. Minot, dated the 31st of May, 1789, to be found in the first volume of the life of Mr. Ames, page 51, he writes:

You dislike the responsibility of the President in the case of the minister of foreign affairs. I would have the President responsible for his appointments; and if those whom he puts in are unfit they may be impeached on misconduct, or he may remove them when he finds them obnoxious. It would be easier for a minister to secure a faction in the Senate or get the protection of the senators of his own State than to secure the protection of the President, whose character would suffer by it. The number of the senators, the secrecy of their doings, would shelter *them*, and a corrupt connection between those who appoint *to* office and who also maintain *in* office and the officers themselves would be created. The meddling of the Senate in appointments is one of the least defensible parts of the Constitution. I would not extend their power any further.

And again, under date of June 23, 1789, page 55 of the same volume:

The debate in relation to the President's power of removal from office is an instance. Four days' unceasing speechifying has furnished you with the merits of the question. The transaction of yesterday may need some elucidation. In the Committee of the Whole it was moved to strike out the words, "to be removable by the President," &c. This did not pass, and the words were retained. The bill was reported to the House, and a motion made to insert in the second clause, "whenever an officer shall be removed by the President, or a vacancy shall happen in any other way," to the intent to strike out the first words. The first words, "to be removable," &c., were supposed to amount to a legislative disposal of the power of removal. If the Constitution had vested it in the President, it was improper to use such words as would imply that the power was to be exercised by him in virtue of this act. The mover and supporters of the amendment supposed that a grant by the legislature might be resumed, and that as the Constitution had already given it to the President it was putting it on better ground, and, if once gained by the declaration of both houses, would be a construction of the Constitution, and not liable to future encroachments. Others, who contended against the advisory part of the Senate in removals, supposed the first ground the most tenable, that it would include the latter, and operate as a declaration of the Constitution, and at the same time expressly dispose of the power. They further apprehended that any change of position would divide the victors and endanger the final decision in both houses. There was certainly weight in this last opinion. Yet, the amendment being actually proposed, it remained only to choose between the two clauses. I think the latter, which passed, and which seems to imply the legal (rather constitutional) power of the President, is the safest doctrine. This prevailed, and the first words were expunged. This has produced discontent, and possibly in the event it will be found disagreement, among those who voted with the majority.

This is, in fact, a great question, and I feel perfectly satisfied with the President's right to exercise the power, either by the Constitution or the authority of an act. The arguments in favor of the former fall short of full proof, but in my mind they greatly preponderate.

You will say that I have expressed my sentiments with some moderation. You will be deceived, for my whole heart has been engaged in this debate. Indeed, it has ached. It has kept me agitated, and in no small degree unhappy. I am commonly opposed to those who modestly assume the rank of champions of liberty and make a very patriotic noise

about the people. It is the stale artifice which has duped the world a thousand times, and yet, though detected, it is still successful. I love liberty as well as anybody. I am proud of it, as the true title of our people to distinction above others; but so are others, for they have an interest and a pride in the same thing. But I would guard it by making the laws strong enough to protect it. In this debate a stroke was aimed at the vitals of the government, perhaps with the best intentions, but I have no doubt of the tendency to a true aristocracy.

It will thus be seen, senators, that the statesmen whom we most revere regarded this as, so to speak, a construction of the Constitution as important as the framing of itself had been. And now, a law of Congress having introduced a revolution in the doctrine and in the practice of the government, a legislative construction binding no one and being entitled to little respect from the changeableness of legislative constructions, in the language of the honorable senator from Oregon, the question arises whether a doubt, whether an act in reference to the unconstitutionality of this law on the part of the executive department is a ground of impeachment. The doctrine of unconstitutional law seems to me—and I speak with great respect—to be wholly misunderstood by the honorable managers in the propositions which they present. Nobody can ever violate an unconstitutional law, for it is not a rule binding upon him or anybody else. His conduct in violating it or in contravening it may be at variance with other ethical and civil conditions of duty: and for the violation of those ethical and civil conditions he may be responsible. If a marshal of the United States, executing an unconstitutional fugitive slave bill, enters with the process of the authority of law, it does not follow that resistance may be carried to the extent of shooting the marshal; but it is not because it is a violation of that law; for if it is unconstitutional there can be no violation of it. It is because civil duty does not permit civil contests to be raised by force and violence. So, too, if a subordinate executive officer, who has nothing but ministerial duty to perform, as a United States marshal in the service of process under an unconstitutional law, undertakes to deal with the question of its unconstitutionality, the ethical and civil duty on his part is, as it is merely ministerial on his part to have his conscience determine whether he will execute it in this ministerial capacity, or whether he will resign his office. He cannot, under proper ethical rules, determine whether the execution of the law shall be defeated by the resistance of the apparatus provided for its execution; but if the law bears upon his personal rights or official emoluments, then, without a violation of the peace, he may raise the question of the law and resist it consistently with all civil and ethical duties.

Thus we see at once that we are brought face to face with the fundamental propositions, and I ask attention to a passage from the Federalist, at page 549, where there is a very vigorous discussion by Mr. Hamilton of the question of unconstitutional laws; and to the case of Marbury *vs.* Madison in 1 Cranch. The subject is old, but it is there discussed with a luminous wisdom, both in advance of the adoption of the Constitution and of its construction by the Supreme Court of the United States, that may well displace the more inconsiderate and loose views that have been presented in debate here. In the Federalist, No. 78, page 541, Mr. Hamilton says:

> Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.
>
> There is no position which depends on clearer principles than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

Digitized by Google

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion, by any means, suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

Again:

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty. (*Ibid.*, 544.)

In the case of Marbury *vs.* Madison, (1 Cranch, pp. 175, 178,) the Supreme Court of the United States, speaking through the great Chief Justice Marshall, said:

The question whether an act repugnant to the Constitution can become the law of the land is a question deeply interesting to the United States; but happily not of an intricacy proportioned to its interests. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established are deemed fundamental, and as the authority from which they proceed is supreme and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited, and that those limits may not be mistaken or forgotten the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be that an act of the legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written constitution, and is, consequently, to be considered by the court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law does it constitute a rule as operative as if it was a law? This would be to

overthrow in fact what was established in theory, and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution—and the Constitution is superior to any ordinary act of the legislature—the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their pow rs within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient in America, where written constitutions have been viewed with so much reverence for rejecting the construction.

Undoubtedly it is a question of very grave consideration how far the different departments of the government, legislative, judicial, and executive, are at liberty to act in reference to unconstitutional laws. The judicial duty, perhaps, may be plain. They wait for a case; they volunteer no advice; they exercise no supervision. But as between the legislature and the executive, even when the Supreme Court has passed upon the question, it is one of the gravest constitutional points for public men to determine when and how the legislature may raise the question again by passing a law against the decision of the Supreme Court, and the Executive may raise the question again by undertaking an executive duty under the Constitution against the decision of the Supreme Court and against the determination of Congress. We in this case have been accused of insisting upon extravagant pretensions. We have never suggested anything further than this, for the case only requires it, that whatever may be the doubtful or debatable region of the co-ordinate authority of the different departments of government to judge for themselves of the constitutionality or unconstitutionality of laws, to raise the question anew in their authentic and responsible public action, when the President of the United States, in common with the humblest citizen, finds a law passed over his right, and binding upon his action in the matter of his right, then all reasons of duty to self, to the public, to the Constitution, to the laws, require that the matter should be put in the train of judicial decision, in order that the light of the serene reason of the Supreme Court may be shed upon it, to the end that Congress even may reconsider its action and retract its encroachment upon the Constitution.

But senators will not have forgotten that General Jackson, in his celebrated controversy with the whig party, claimed that no department of the government should receive its final and necessary and perpetual exclusion and conclusion on a constitutional question from the judgment even of the Supreme Court, and that under the obligations of each one's oath, yours as senators, yours as representatives, and the President's as Chief Executive, each must act in a new juncture and in reference to a new matter arising to raise again the question of constitutional authority. Now, let me read in a form which I have ready for quotation a short passage on which General Jackson in his protest sets this forth. I read from a debate on the fugitive slave law as conducted in this body in the year 1852, when the honorable senator from Massachusetts [Mr. Sumner] was

Digitized by Google

the spokesman and champion of the right for every department of the government to judge the constitutionality of law and of duty:

But whatever may be the influence of this judgment—

That is, the judgment of the Supreme Court of the United States in the case of Prigg *vs.* Pennsylvania—

But whatever may be the influence of this judgment as a rule to the judiciary, it cannot arrest our duty as legislators. And here I adopt, with entire assent, the language of President Jackson, in his memorable veto, in 1832, of the Bank of the United States. To his course was opposed the authority of the Supreme Court, and this is his reply:

"If the opinion of the Supreme Court covers the whole ground of this act it ought not to control the co-ordinate authorities of this government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. *Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.* It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."

With these authoritative words of Andrew Jackson I dismiss this topic. (Appendix to Congressional Globe, Thirty-second Congress, first session, p. 1108.)

"Times change and we change with them." Nevertheless, principles remain, duties remain, the powers of government remain, their co-ordination remains, the conscience of men remains, and everybody that has taken an oath, and everybody that is subject to the Constitution without taking an oath, by peaceful means has a right to revere the Constitution in derogation of unconstitutional laws; and any legislative will or any judicial authority that shall deny the supremacy of the Constitution in its power to protect men who thus conscientiously, thus peacefully raise questions for determination in a conflict between the Constitution and the law, will not be consistent with written constitutions or with the maintenance of the liberties of this people as established by and dependent upon the preservation of written constitutions.

Now let us see whether upon every ethical, constitutional, and legal rule the President of the United States was not the person upon whom this civil-tenure act operated, not as an executive officer to carry out the law, but as one of the co-ordinate departments of the government over whom in that official relation the authority of the act was sought to be asserted. The language is general: "Every removal from office contrary to the provisions of this act shall be a high misdemeanor." Who could remove from office but the President of the United States? Who had the authority? Who could be governed by the law but he? And it was in an official constitutional duty, not a personal right, not a matter of personal value or choice or interest with him.

When, therefore, it is said and claimed that by force of a legislative enactment the President of the United States should not remove from office, whether the act of Congress was constitutional or not, that he was absolutely prohibited from removing from office, and if he did remove from office, although the Constitution allowed him to remove, yet the Constitution could not protect him for removing, but that the act of Congress, seizing upon him, could draw him in here by impeachment and subject him to judgment for violating the law, though maintaining the Constitution, and that the Constitution pronounced sentence of condemnation and infamy upon him for having worshiped its authority and sought to maintain it, and that the authority of Congress has that power and extent practically, you tear asunder your Constitution, and (if on these grounds you dismiss this President from this court convicted and deposed) you dismiss him the victim of the Congress and the martyr of the Constitution by the very terms of your judgment, and you throw open for the masters of us all in the great debates of an intelligent, instructed, populous, patriotic nation of freemen the

Digitized by Google

division of sentiment to shake this country to its centre, "the omnipotence of Congress" as the rallying cry on one side, and "the supremacy of the Constitution" on the other.

Mr. CONKLING. Mr. President, I move an intermission for fifteen minutes.

The motion was agreed to; and after the expiration of the recess the Chief Justice resumed the chair and called the Senate to order.

Mr. GRIMES. Mr. Chief Justice, I move a call of the Senate.

The motion was agreed to.

The CHIEF JUSTICE. The Secretary will call the roll.

The chief clerk called the roll.

The CHIEF JUSTICE. There are forty-two senators answering to their names. A quorum is present. The counsel for the President will proceed.

Mr. EVARTS. There is but one other topic that I need to insist upon here as bearing upon that part of my argument which is intended to exhibit to the clear apprehension, and I hope adoption, of this court, the view that all here that possesses weight and dignity, that really presents the agitating contest which has been proceeding between the departments of our government, is political and not criminal, or suitable for judicial cognizance; and that is what seems to me the decisive test in your judgments and in your consciences; and that is the attitude that every one of you already in your public action occupies toward this subject.

The Constitution of the United States never intended so to coerce and constrain the consciences and the duties of men as to bring them into the position of judges between themselves and another branch of government in regard to matters of difference between themselves and that other branch of government in matters which concerned wholly the partition of authority under the Constitution between themselves and that other department of the government. The eternal principles of justice are implied in the constitution of every court, and there are no more immutable, no more inevitable principles than these, that no man shall be a judge in his own cause, and that no man shall be a judge in a matter in which he has already given judgment. It is abhorrent to the natural sense of justice that men should judge in their own cause. It is inconsistent with nature itself that man should assume an oath and hope to perform it by being impartial in his judgment when he has already formed it. The crimes that a President may have imputed to him that may bring him into judgment of the Senate are crimes against the Constitution or the laws involving turpitude or personal delinquency.

They are crimes in which it is inadmissible to imagine that the Senate should be committed as parties at all. They are crimes which, however much the necessary reflection of political opinions may bias the personal judgment of this or that member, or all the members of the body—an infirmity in the court which cannot be avoided—yet it must be possible only that they should give a color or a turn and not be themselves the very basis and substance of the judgment to be rendered. When, therefore, I show you as from the records of the Senate that you yourselves have voted upon this law whose constitutionality is to be determined, and that the question of guilt or innocence arises upon constitutionality or judgment of constitutionality, when you have in your capacity of a Senate undertaken after the alleged crime committed, as an act suitable in your judgment to be performed by you in your relation to the executive authority and your duty under this government to pronounce, as you did by resolution, that the removal of Mr. Stanton and the appointment of General Thomas were not authorized by the Constitution and the laws, you either did or did not regard that as a matter of political action; and if you regarded it as a matter of political action, then you regarded it as a matter that could not possibly be brought before you in your judicial capacity for you to determine upon any personal consequences to the Executive. How was it a matter for political action unless

Digitized by Google

it was a matter of his political action and the controversy was wholly of a political nature? If you, on the other hand, had in your minds the possibility of this extraordinary jurisdiction being brought into play by a complaint to be moved by the House of Representatives before you, what an extraordinary spectacle do you present to yourselves and to the country! No; the controlling, the necessary feeling upon which you acted must have been that "it is a stage and a step in governmental action concerning which we give this admonition and this suggestion and this reproof."

In 1834, when the Senate of the United States was debating the question of the resolution condemnatory of General Jackson's proceedings in reference to the deposits and Mr. Duane, the question was raised, "Can you, will you, should you pronounce opinion upon a matter of this kind when possibly it may be made the occasion, if your views are right, of an impeachment and of a necessary trial?" The answer of the great and trusted statesman of the Whig party of that day was, "If there was in the atmosphere a whisper, if there was in the future a menace, if there was a hope or a fear, accordingly as we may think or feel, that impeachment was to come, debate must be silenced and the resolution suppressed." But they recognized the fact that it was mere political action that was being resorted to, and that was or was to be possible; but the complexion of the House, and the sentiment of the House, and the attitude of the Senate as claiming it only to be matter of political discussion and determination, absolutely rejected the notion of impeachment, and labored, therefore, the debate a political debate and the conclusion a political conclusion.

There is but one proposition that consists with the truth of the case and with the situation of you, senators, here, and that is that you regarded this as political action and political decision, not by possibility a matter of judgment on a subject to be introduced for judicial consideration. It is not true that that resolution does not cover guilt; it only expresses an opinion that the state of the law and the authority of the Constitution did not cover the action of the President, but it does not impute violence or design or wickedness of purpose, or other than a justifiable difference of opinion to resort to an arbiter between you. But, even in that limited view, I take it no senator can think or feel that, as a preliminary part of the judgment of a court that was to end in acquittal or conviction, this proceeding could be for a moment justified.

The two gravest articles of impeachment against the weightiest trial ever introduced into this court, those on which as large a vote of condemnation was gained as upon any others, were the two articles against Judge Chase, one of which brought him in question for coming to the trial of Fries, in Pennsylvania, with a formed and pronounced opinion; and another, the third, was for allowing a juryman to enter the box on the trial of Callender, at Richmond, who stated that he had formed an opinion.

I would like to see a court of impeachment that regards this as great matter that a judge should come to a trial and pronounce a condemnation of the prisoner before the counsel are heard, and should allow a juryman to enter the box who excused himself from having a free mind on the point discussed as he had formed an opinion, and yet that should tell us that you, having formed and expressed an opinion, are to sit here judges on such a matter as this. What is there but an answer of this kind necessary? The Constitution never brings a Senate into an inculpation and a condemnation of a President upon matters in which and of which the two departments of the government in their political capacities have formed and expressed political opinions. It is of other matter and of other fault, in which there are no parties and no discriminations of opinion. It is of offence, of crime, in which the common rules held by all of duty, of obligation, of excess, or of sin, are not determinable upon political opinions formed and expressed in debate.

Digitized by Google

But the other principle is equally contravened, and this aids my argument

that it is political and not personal or criminal; it is that you are to pass judgment of and concerning the question of the partition of the offices of this government between the President and yourselves. The very matter of his fault is that he claims them; the very matter of his condemnation is that you have a right to them; and you, aided by the list furnished by the managers, of forty-one thousand in number and $21,000,000 of annual emolument, are to sit here as judges whether his false claim and his appeal to a common arbiter in a matter of this kind is to be imputed to him as personal guilt and followed by personal punishment.

How would any of us like to be tried before a judge who, if he condemned us, would have our houses, and if he acquitted us we should have his? So sensitive is the natural sense of justice on this point that the whole country was in a blaze by a provision in the fugitive slave law that a commissioner should have but five dollars if he set the slave free, and ten dollars if he remanded him. Have honorable judges of this court forgotten that crisis of the public mind as to allowing a judge to have an interest in the subject of his judgment? Have they forgotten that the honorable senator from Massachusetts in the debate upon this tenure-of-office act thought that political bias might affect a court so that it might give judgment of but nominal punishment for an infraction of the act? And yet you are full of politics. Why? Because the question is political; and the whole point of my reference is as an absolute demonstration that the Constitution of the United States never forces honorable men into a position where they are judges in their own cause, or where they have in the course of their previous duties expressed a judgment.

I have omitted from this consideration the fact that the great office itself, if by your judgment it shall be taken from the elected head of this republic, is to be put in commission with a member of your own body chosen to-day, and to-morrow, at any time, by yourselves, and that you are taking the crown of the people's magistracy and of the people's glory to decorate the honor of the Senate. An officer who, by virtue of your favor, holds the place of President *pro tempore* of your body adds the Presidency to its duties by the way; and an officer changeable from day to day by you as you choose to have a new President *pro tempore*, who by the same title takes from day to day the discharge of the duties of President of the United States.

When the prize is that, and when the circumstances are as I have stated, senators must decline a jurisdiction upon this demonstration that human nature and human virtue cannot endure that men should be judges in such a strife. I will agree your duty keeps you here. You have no right to resign or avoid it; but it is a duty consistent with judicial fairness, and only to be assumed as such; and the subject itself, thus illustrated, snatches from you at once, as wholly political, the topics that you have been asked to examine.

It will suit my convenience and sense of the better consideration of the separate articles of impeachment to treat them at first somewhat generally, and then, by such distribution as seems most to bring us finally to what, if it shall not before that time have disappeared, appears to be the gravest matter of consideration.

Let me ask you at the outset to see how little as matter of evidence this case is. Certainly this President of the United States has been placed under as trying and as hot a gaze of political opposition as ever a man was or could be. Certainly for two years there has been no partial construction of his conduct. Certainly for two years he has been sifted as wheat by one of the most powerful winnowing machines that I have ever heard of—the House of Representatives of the United States of America. Certainly the wealth of the nation, certainly the urgency of party, certainly the zeal of political ambition, have pressed into the service of imputation, of inculpation, and of proof all that this country affords, all that the power "to send for persons and papers" includes.

They have none of the risks that attend ordinary litigants of bringing their witnesses in court to stand the test of open examination and cross-examination; but they can put them under the constriction of an oath and an exploration in advance and see what they can prove, and so determine whom they will bring and whom they will reject. They can take our witness from the stand already under oath, and even of so great and high a character as the Lieutenant General of your armies, and out of court ply him with a new oath and a new examination to see whether he will help or hurt them by being cross-examined in court. Every arm and every heart is at their service, stayed by no sense except of public duty to unnerve their power or control its exercise.

And yet here is the evidence. The people of this country have been made to believe that all sorts of personal vice and wickedness, that all sorts of official misconduct and folly, that all sorts of usurpation and oppression, practiced, meditated, plotted, and executed on the part of this Executive, were to be explored and exposed by the prosecution and certainly set down in the record of this court for the public judgment. Here you have for violence, oppression, and usurpation, a telegram between the President and Governor Parsons, long public, two years ago. You have for his desire to suppress the power of Congress the testimony of Wood, the office-seeker, that when the President said he thought the points were important he said that he thought they were minor, and that he was willing to take an office from the President and yet uphold Congress; that the President said they were important, and he thought the patronage of the government should be in support of those principles which he maintained, and Wood, the office-seeker, went home and was supposed to have said that the President had used some very violent and offensive words on the subject, and he was brought here to prove them, and he disproved them.

Now, weigh the testimony upon the scale that a nation looks at it, upon the scale that foreign nations look at it, upon the scale that history will apply to it, upon the scale that posterity will in retrospect regard it. It depends a good deal upon how large a selection a few specimens of testimony could offer. If I bring a handful of wheat marked by rust and weevil, and show it to my neighbor, he will say, "Why, what a wretched crop of wheat you have had;" but if I tell him "these few kernels are what I have taken from the bins of my whole harvest," he will answer, "What a splendid crop of wheat you have had." And now answer, answer if there is anything wrong in this? Mr. Manager Wilson, from the Judiciary Committee that had examined for more than a year this subject, made a report to the House. It is the wisest, the clearest, and also one of the most entertaining views of the whole subject of impeachment in the past and in the present that I have ever seen or can ever expect to see, and what is the result? That it is all political. All these thunder-clouds are political, and it is only this little petty pattering of rain and these infractions of statutes that are personal or criminal. And "the grand inquest of the nation" summoned to the final determination upon the whole array, on the 9th of December, 1867, votes 107 to 57, "no impeachment." If these honorable managers had limited their addresses to this court to matters that in purpose, in character, in intent, and in guilt, occurred after that bill of impeachment was thrown out by their house, how much you would have been entertained in this cause! I have not heard anything that had not occurred before that. The speeches were made eighteen months before. The telegram occurred a year before. Wood, the office-seeker, came into play long before. What is there, then, not covered by this view?

The honorable managers, too, do not draw together always about these articles. There seem to have been an original production, and then a sort of afterbirth that is added to the compilation, and as I understand the opening manager, [Mr. Butler,] if there is not anything in the first article you need not trouble yourself to think there is anything in the eleventh; and Mr. Manager

Stevens thinks that if there is not anything in the eleventh you had better not bother yourself in looking for anything in the first ten, for he says a county-court lawyer, I think, could get rid of them. Let me give you his exact words:

I wish this to be particularly noticed, for I intend to offer it as an amendment. I wish gentlemen to examine and see that this charge is nowhere contained in any of the articles reported, and unless it be inserted there can be no trial upon it; and if there be the shrewd lawyers, as I know there will be, and cavilling judges—

He did not state that he felt sure of that—

and without this article they do not acquit him, they are greener than I was in any case I ever undertook before the court of quarter sessions.

It will not be too vain in us to think that we come up perhaps to this estimate on our side, and at this table, of these quarter-session lawyers that would be adequate to dispose of these articles of impeachment; and they are right about it, quite right about it. If you cannot get in what is political and nothing but political, you cannot get hold of anything that is criminal or personal.

Now, with that general estimate of the limit and feebleness of the proofs and of the charges, I begin with the consideration of an article in regard to which, and the subject-matter of which, I am disposed to concede more than I imagine can be claimed fairly in regard to the other articles, that some proof to the point of demonstration has been presented, and that is the speeches. I think that it has been fairly proved here that the speeches charged upon the President, in substance and in general, were made. My first difficulty about them is that they were made in 1866, and related to a Congress that has passed out of existence, and were a subject in the report of the Judiciary Committee to the House, upon which the House voted that they would not impeach. My next is that they are crimes against rhetoric, against oratory, against taste, and perhaps against logic, but that the Constitution of the United States neither in itself nor by any subsequent amendments has provided for the government of the people of this country in these regards. It is a novelty in this country to try anybody for making a speech.

There are a great many speeches made in this country, and therefore the case undoubtedly would have arisen in the course of 80 years of our government. Indeed, I believe, if there is anything that marks us, and to the approval, at least in ability, of other nations, it is that any man in this country not only has a right to make a speech, but can make a speech and a good one, and that he does some time or other in his life actually accomplish it. Why, the very lowest epithet for speech-making in the American public adopted by the newspapers is "able and eloquent." [Laughter.] I have seen applied to the efforts of the honorable managers here the epithet, in advance in the newspapers, of "tremendous" [laughter] before they have been delivered here, of "tremendous force;" and I saw once an accurate arithmetical statement of the force of one of them in advance that it contained thirty-three thousand words. [Laughter.]

We are speech makers; therefore the case must have arisen for a question of propriety; and now for the first time we begin with the President, and accuse him; we take him before no ordinary court, but organize a court for the purpose, which adjourns the moment it is over with him, furnishes no precedent, and must remove him from office and order a new election. That is a great deal to turn on a speech. Only think of it! To be able to make a s peech that should require a new election of a President to be held! Well, if the trial is to take place, let the proclamation issue to this speech making people, "let him that is without sin among you cast the first stone;" and see how the nation on tiptoe waits; but who will answer that dainty challenge and who assume that fastidious duty? We see in advance the necessary requirements. It must be one who by long discipline has learned always to speak within bounds, one whose lips would stammer at an imputation, whose cheek would blush at a reproach, whose ears would tingle at an invective, and whose eyes would close

Digitized by Google

at an indecorum. It must be one who by strict continuance of speech and by control over the tongue, that unruly member, has gained with all his countrymen the praise of ruling his own spirit, which is greater than one who taketh a city.

And now the challenge is answered; and it seems that the honorable manager to whom this duty is assigned is one who would be recognized at once in the judgment of all as first in war, first in peace in boldness of words, first in the hearts of all his countrymen that love this wordy intrepidity. [Laughter.] Now, the champion being gained, we ask for the rule, and in answer to an interlocutory inquiry which I had the honor to address to him, he said the rule was the opinion of the court that was to try the case.

Now, let us see whether we can get any guidance as to what your opinions are on this subject of freedom of speech; for we are brought down to that, having no law or precedent besides. I find that the matter of charge against the President is that he has been "unmindful of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the government." If it prevails from the executive toward the legislative, it should prevail from the legislative toward the executive, upon the same standard, unless I am to be met with what I must regard as a most novel view presented by Mr. Manager Williams in his argument the other day, that as the Constitution of the United States prevents your being drawn in question anywhere for what you say, therefore it is a rule that does not work both ways. [Laughter.] Well, that is a remarkable view of personal duty, that if I wore an impenetrable shirt of mail, it is just the thing for me to be drawing daggers against everybody else that is met in the street. "*Noblesse oblige*" seems to be a law which the honorable manager does not think applicable to the houses of Congress. If there be anything in that suggestion, how should it guard, reduce, and regulate your use of freedom of speech? I have not gone outside of the debates that relate to this civil-tenure act; my time has been sufficiently occupied in reading all that was said in both houses on that subject; but I find now a well-recorded precedent not merely in the observations of a single senator, but in a direct determination of the Senate itself passing upon the question what certain bounds at least of freedom of speech as between the two departments of the government permitted. The honorable senator from Massachusetts, in the course of the debate, using this form of expression in regard to the President, said, and on the subject of this very law:

You may ask protection, against whom? I answer plainly, protection against the President of the United States. There, sir, is the duty of the hour. Ponder it well, and do not forget it. There was no such duty on our fathers; there was no such duty on our recent predecessors in this chamber, because there was no President of the United States who had become the enemy of his country (Congressional Globe, 2d sess. 39th Congress, p. 525.)

The President had said that Congress was "hanging on the verge of the government;" but here is a direct charge that the President of the United States is an enemy of the country. Mr. Sumner being called to order for this expression, the honorable senator from Rhode Island, [Mr. Anthony,] who not unfrequently presides with so much urbanity and so much control over your deliberations, gave this aid to us as to what the common law of this tribunal was on the subject of the harmonies and courtesies that should prevail between the legislative and the executive departments. He said:

It is the impression of the Chair that those words do not exceed the usual latitude of debate which has been permitted here.

Is not that a good authority, the custom of the tribunal established by the presiding officer? Mr. Sherman, the honorable senator from Ohio, said:

I think the words objected to are clearly in order. I have heard similar remarks fifty times without any question of order being raised.

Communis error facit jus. That is the principle of this view; and the Senate

Digitized by Google

came to a vote, the opposing numbers of which remind me of some of the votes on evidence that we have had in this trial; the appeal was laid on the table by 29 yeas to 10 nays. [Laughter.]

We shall get off pretty easy from a tribunal whose "usual latitude of debate" permits the legislative branch to call the Executive an enemy of his country. But that is not all. Proceeding in the same debate, after being allowed to be in order, Mr. Sumner goes on with a speech, the eloquence of which I cannot be permitted to compliment, as it is out of place, but certainly it is of the highest order, and of course I make no criticism upon it; but he begins with an announcement of a very good principle:

Meanwhile I shall insist always upon complete freedom of debate, and I shall exercise it. John Milton, in his glorious aspirations, said "Give me the liberty to know, to utter, and to argue freely, above all liberties." Thank God, now that slave-masters have been driven from this chamber, such is the liberty of an American senator! Of course there can be no citizen of a republic too high for exposure, as there can be none too low for protection. The exposure of the powerful and the protection of the weak—these are not only invaluable liberties but commanding duties.

Is there anything in the President's answer that is nobler or more thoroughgoing than that? And if the President is not too high, but that it should be not only an invaluable liberty but a commanding duty to call him an enemy of the country, may not the House of Representatives be exposed to an imputation of a most unintelligible aspersion upon them that they "hang on the verge of the government?" Then the honorable senator proceeds with a style of observation upon which I shall make no observation whatever, and I feel none, but Cicero, *in Catalinam, in Verrem, et pro Milonem*, does not contain more eloquence against the objects of his invective than this speech of the honorable senator. Here are his words:

At last the country is opening its eyes to the actual condition of things. Already it sees that Andrew Johnson, who came to supreme power by a bloody accident, has become the successor of Jefferson Davis in the spirit by which he is governed and in the mischief he is inflicting on his country. It sees the president of the rebellion revived in the President of the United States. It sees that the violence which took the life of his illustrious predecessor is now by his perverse complicity extending throughout the rebel States, making all who love the Union its victims and filling the land with tragedy. It sees that the war upon the faithful Unionists is still continued under his powerful auspices, without any distinction of color, so that all, both white and black, are sacrificed. It sees that he is the minister of discord, and not the minister of peace. It sees that, so long as his influence prevails, there is small chance of tranquillity, security, or reconciliation; that the restoration of prosperity in the rebel States, so much longed for, must be arrested; that the business of the whole country must be embarrassed, and that those conditions on which a sound currency depends must be postponed. All these things the country now sees. But indignation assumes the form of judgment when it is seen also that this incredible, unparalleled, and far-reaching mischief, second only to the rebellion itself, of which it is a continuation, is invigorated and extended through a plain usurpation. * * * * *

The President has usurped the powers of Congress on a colossal scale, and he has employed these usurped powers in fomenting the rebel spirit and awakening anew the dying fires of the rebellion. Though the head of the executive, he has rapaciously seized the powers of the legislative, and made himself a whole Congress, in defiance of a cardinal principle of republican government, that each branch must act for itself without assuming the powers of the others; and, in the exercise of these illegitimate powers, he has become a terror to the good and a support to the wicked. This is his great and unpardonable offence, for which history must condemn him if you do not. He is a usurper, through whom infinite wrong has been done to his country. He is a usurper, who, promising to be a Moses, has become a Pharaoh. (Congressional Globe, 2d sess., 39th Congress, p. 541.)

And then it all ends in a wonderfully sensible—if the honorable senator will allow me to say so—and pithy observation of the honorable senator from Wisconsin, [Mr. Howe:]

The senator from Massachusetts has advanced the idea that the President has become an enemy to his country. * * * * * * But I suppose that not only to be the condition of the sentiment in this Senate touching the present President of the United States, but I suppose we never had a President who was not in communication with a Senate divided upon just that question, some thinking that he was an enemy of the country and others thinking that he was not; and I respectfully submit, therefore,

Digitized by Google

that the senator from Massachusetts will be competent to try an impeachment if it should be sent here against the President, as I conceive the senator from Maryland would be competent to try that question in spite of the opinion which he has pronounced here. (Ibid., p. 545.)

That is good sense. Senatorial license must, if it goes so wide as this, sometimes with good-natured senators be properly described as a little Pickwickian.

We have also a rule provided for us in the House of Representatives, and I have selected a very brief one, because it is one that the honorable managers will not question at all, as it gives their standard on the subject. I find that there this rule of license in speech, in a very brief, pithy form, is thus conducted between two of the most distinguished members of that body, who can, as well as any others, for the purpose of this trial, furnish a standard of what is called by the honorable manager "propriety of speech." I read from page 263 of the Congressional Globe for the fortieth Congress, first session:

Mr. BINGHAM. I desire to say, Mr. Chairman, that it does not become a gentleman who recorded his vote fifty times for Jefferson Davis, the arch traitor in this rebellion, as his candidate for President of the United States, to undertake to damage this cause by attempting to cast an imputation either upon my integrity or my honor. I repel with scorn and contempt any utterance of that sort from any man, whether he be the hero of Fort Fisher not taken or of Fort Fisher taken. [Laughter.]

Now, for the reply:

Mr. BUTLER. But if during the war the gentleman from Ohio did as much as I did in that direction I shall be glad to recognize that much done. But the only victim of the gentleman's prowess that I know of was an innocent woman hung upon the scaffold, one Mrs. Surratt. And I can sustain the memory of Fort Fisher if he and his present associates can sustain him in shedding the blood of a woman tried by a military commission and convicted without sufficient evidence, in my judgment.

To which, on page 364, Mr. Bingham responds with spirit:

I challenge the gentleman, I dare him here or anywhere in this tribunal, or in any tribunal, to assert that I spoliated or mutilated any book. Why, sir, such a charge, without one tittle of evidence, is only fit to come from a man who lives in a bottle and is fed with a spoon. [Laughter.]

Now, what under heaven that means I am sure I do not know, [laughter,] but it is within the common law of courtesy in the judgment of the House of Representatives. We have attempted to show that in the President's addresses to the populace there was something of irritation, something in the subjects, something in the manner of the crowd that excused and explained, if it did not justify, the style of his speech. You might suppose that this interchange in debate grew out of some subject that was irritating, that was itself savage and ferocious; but what do you think was the subject these honorable gentlemen were debating upon? Why, it was charity. [Laughter.] The question of charity to the South was the whole staple of the debate; "charity," which "suffereth long and is kind." "Charity envieth not." "Charity vaunteth not itself, is not puffed up." [Laughter.] Charity "doth not behave itself unseemly, seeketh not her own, is not easily provoked, thinketh no evil, rejoiceth not in iniquity, but rejoiceth in the truth, beareth all things, believeth all things, hopeth all things, endureth all things; charity never faileth." But, then, the Apostle adds, which I fear might not be proved here, "tongues may fail." [Laughter.]

Now, to be serious, in a free republic who will tolerate this fanfaronade about speech-making? "*Quis tulerit Gracchos de seditione querentes.*"

Who will tolerate public orators prating about propriety of speech? Why cannot we learn that our estimate of others must proceed upon general views, and not vary according to particular passions or antipathies? When Cromwell in his career through Ireland, in the name of the Parliament, had set himself down before the town of Ross and summoned it to surrender, exhausted in its resistance, this Papist community asked to surrender only upon the conditions of freedom of conscience. Cromwell replied: "As to freedom of conscience, I meddle with no man's conscience; but if you mean by that liberty to celebrate

the mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted." So, freedom of speech the honorable managers in their imputation do not complain of; but if anybody says that the House of Representatives hangs upon the verge of the government, we are to understand that in no place where the power of the two houses of Congress prevails shall that degree of liberty be enjoyed, though they meddle with no man's propriety or freedom of speech.

Mr. Jefferson had occasion to give his views about the infractions upon freedom of writing that the sedition law introduced in the legislature of this country, and at the same time some opinion about the right of an Executive to have an opinion about the constitutionality of a law and to act accordingly; and I will ask your attention to brief extracts from his views. Mr. Jefferson, in a letter to Mr. President Adams, written in 1804, (Jefferson's Works, vol. 3, p. 555,) says:

I discharged every person under the punishment or prosecution under the sedition law, because I considered and now consider that law to be a nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image, and that it was as much my duty to arrest its execution in every stage as it would have been to have rescued from the fiery furnace those who should have been cast into it for refusing to worship the image. It was accordingly done in every instance, without asking what the offenders had done or against whom they had offended, but whether the pains they were suffering were inflicted under the pretended sedition law.

And in another letter he replies to some observations against this freedom of the Executive about the constitutionality of laws:

You seem to think it devolved on the judges to decide on the validity of the sedition law; but nothing in the Constitution has given them a right to decide for the Executive more than for the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges believing the law constitutional, had a right to pass a sentence of fine and imprisonment, because the power was placed in their hands by the Constitution; but the Executive believing the law to be unconstitutional, were bound to remit the execution of it, because that power had been confided to them by the Constitution. That instrument meant that its coördinate branches should be checks on each other; but the opinion which gives the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action, but for the legislature and Executive also in their sphere, would render the judiciary a despotic branch.

We have no occasion and have not asserted the right to resort to these extreme opinions which it is known Jefferson entertained. The opinions of Madison, more temperate but equally thorough, were to the same effect. The coördinate branches of the government must surrender their coördination whenever they allow a past rescript to be a final bar to renewing or presenting constitutional questions for reconsideration and redetermination, if necessary, even by the Supreme Court.

But we have here some instances of the courtesy prevailing in the different branches of the government in the very severe expression of opinion that Mr. Manager Boutwell indulged in in reference to the heads of departments. That is an executive branch of the government; and here you are sitting in these halls, and the language used was as much severer, as much more degrading to that branch of the government than anything said by the President in reference to Congress as can be imagined. Exception here is taken to the fact that the President called congressmen, it is said, in a telegram, "a set of individuals." We have heard of an old lady not well instructed in long words who got very violent at being called an individual, because she supposed it was opprobrious. But here we have an imputation in so many words that the heads of departments are "serfs of a lord, servants of a master, slaves of an owner." And yet in this very presence sits the eminent Chief Justice of the United States, and the eminent senator from Maine, (Mr. Fessenden,) and the distinguished senator from Pennsylvania, (Mr. Cameron,) all of whom have held cabinet offices by this tenure, thus decried and derided; and if I were to name the senators who

Digitized by Google

aspire n the future to hold these degraded positions, I am afraid I should not leave judges enough here to determine this cause. (Laughter.) All know that this is all extravagance. "*Est modus in rebus; sunt certi denique fines.*"

There is some measure in things. There is some limit to the bounds of debate and discussion and imputation. I will agree that nothing could be more unfortunate than the language used by the President as offending the serious and religious tastes and feelings of a community, in the observations which he was drawn into by a very faulty method of reasoning, in a speech that he made at St. Louis. The difficulty is, undoubtedly, that the President is not familiar with the graces taught at schools, the costly ornaments and studied contrivances of speech, but that he speaks right on; and when an obstacle is presented in his path he proceeds right over it. But here is a rhetorical difficulty for a man not a rhetorician. An illusive metaphorical suggestion has been made that he is a Judas. If anybody—I do not care how practiced he is—undertakes to become logical with a metaphor, he will get into trouble at once; and that was the President's difficulty. He looked around with the eye of a logician and said, "Judas's fault was the betrayal of all goodness. Where is the goodness that I have betrayed?" And the moment, therefore, that you seek to be logical by introducing the name of the Divinity against whom he had thus sinned, of course you would produce that offence and shock to our senses which otherwise would not have been occasioned.

I am not entirely sure that when you make allowances for the difference between an *ex tempore* speech of the President to a mob, and a written, prepared, and printed speech to this court, by an honorable manager, but that there may be some little trace of the same impropriety in that figure of argument which presented Mr. Carpenter to your observation as an inspired painter, whose pencil was guided by the hand of Providence to the apportionment of Mr. Stanton to perpetual bliss, and of Governor Seward to eternal pains. [Laughter.] But all that is matter of taste, matter of feeling, matter of discretion, matter of judgment.

The serious views impressed upon you with so much force by the counsel for the President who opened this cause for us, and supported by the quotations from Mr. Madison, present this whole subject in its proper aspect to an American audience. I think that if our newspapers would find some more discriminating scale of comment on speeches than to make the lowest scale "able and eloquent," we should have a better state of things in public addresses.

Our position in regard to the speeches is, that the circumstances produced in truth should be considered, that words put into the speaker's mouth from the calls of the crowd, ideas suddenly raised by their unfriendly and impolite suggestions, are to have their weight, and that without apologizing, for no man is bound to apologize before the law or before the court for the exercise of freedom of speech, it may be freely admitted that it would be very well if all men were accomplished rhetoricians, finished logicians, and had a bridle on their tongues.

And now, without pausing at all upon the eleventh article, which I leave to the observations of the honorable managers among themselves to dispose of, I will take up the Emory article. The Emory article is an offence which began and ended on the 22d of February, and is comprised within a half hour's conversation between the President and a general of our armies.

I dare say that in the rapid and heated course of this impeachment through the House of Representatives it may have been supposed by rumor, uncertain and amplified, that there had occurred some kind of military purpose or intention on the part of the President that looked to the use of force; but under these proofs what can we say of it but that the President received an intimation from Secretary Welles that all the officers were being called away from what doubtless is their principal occupation in time of peace, attendance upon levees, were summoned, as they were from the halls of revelry at Brussels to the battle

of Waterloo, and it was natural to inquire when and where this battle was to take place; and the President, treating it with very great indifference, said he did not know anything about General Emory, and did not seem to care anything about it; but finally, when Secretary Welles said, "You had better look into it," he did look into it, and there was a conversation which ended in a discussion of constitutional law between the President and the general, in which the general, re-enforced by Mr. Reverdy Johnson, a lawyer, and Mr. Robert J. Walker, a lawyer, actually put down the President entirely! [Laughter.] Now, if he ought to be removed from office for that, and a new election ordered for that, you will so determine in your judgment; and if any other President can go through four years without doing something worse than that, we shall have to be more careful in the preliminary examinations in our nominating conventions. [Laughter.] I understand this article to be hardly insisted upon.

Then come the conspiracy articles. The conspiracy consists in this: It was all commenced and completed in writing; the documents were public; they were immediately promulgated, and that is the conspiracy, if it be one. It is quite true that the honorable manager, who conducted with so much force and skill the examinations of the witnesses, did succeed in proving that besides the written orders handed by the President of the United States to General Thomas, there were a few words of attendant conversation, and those words were, "I wish to uphold the Constitution and the laws," and an assent of General Thomas to the propriety of that course. But by the power of our profession the learned manager made it evident, by the course of his examination, in which he asked the witness if he had ever heard those words used before when a commission was delivered to him and receive for reply that it had not, and that it was not routine, that they carried infinite gravity of suspicion!

What is there that we cannot believe in the power of counsel to affix upon innocent and apparently laudable expressions these infinite consequences of evil surmise, when we remember how, in a very celebrated trial, "chops and tomato sauce" were to go through the service of getting a verdict from a jury on a question of a breach of promise of marriage? [Laughter.] Now, "chops and tomato sauce" do not import a promise of marriage; there is not the least savor of courtship nor the least flavor of flirtation, even, in them; but it is in "the hidden meaning." And so "the Constitution and the laws," by these two men, at midday, and in writing, entering into a conspiracy, mean, we are told, bloodshed, civil commotion, and war! Well, I cannot argue against it. Cardinal Wolsey said that in political times you could get a jury that would bring in a verdict that Abel killed Cain; and it may be that an American Senate will find that in this allusion to the Constitution and the laws is found sufficient evidence to breed from it a purpose of commotion and civil war.

But the conspiracy articles have but a trivial foundation to rest upon. Here we have a statute passed at the eve of the insurrection intended to guard the possession of the offices of the United States from the intrusion of intimidation, threats, and force, to disable the public service. It is, in fact, a reproduction of the first section of the sedition act of 1798 somewhat amplified and extended. It is a law wholly improper in time of peace, for, in the extravagance of its comprehension, it may include much more than should be made criminal, except in times of public danger. But the idea that a law intended to prevent rebels at the south, or rebel sympathizers, as they were called, at the north, from intimidating officers in the discharge of their public duty, should be wrested to an indictment and trial of a President of the United States and an officer of the army under a written arrangement of orders to take possession of and administer one of the departments of the government according to law, is wresting a statute wholly from its application. We are all familiar with the illustration that Blackstone gives us of the impropriety of following the literal words of a statute as against a necessary implication, when he says that a statute against letting

blood in the street could not properly support an indictment against a surgeon for tapping the vein of an apoplectic patient who happened to have fallen on the sidewalk. And there is no greater perversity or contrariety in this effort to make this statute applicable to orderly and regular proceedings between recognized officers of the United States in the disposition of an office than there would be in punishing the surgeon for relieving the apoplectic patient.

I did not fully understand, though I carefully attended to, the point of the argument of the learned manager, [Mr. Boutwell,] who, with great precision and detail, brought into view the common law of Maryland as adopted by Congress for the government in the domestic and ordinary affairs of life of the people in this District; but if I did rightly understand it, it was that, though there was nothing in the penal code of the District, and although the act of 1801 did not attempt to make a penal code for the District, yet somehow or other it became a misdemeanor for the President of the United States, in his official functions, to do what he did do about this office, because it was against the common law of Maryland as applied in this District.

I take it that I need not proceed on this subject any further. The common law has a principle that when the common law stigmatizes a *malum in se* and a felony it may be a misdemeanor at common law to attempt it and to use the means. But the idea that when a statute makes *malum prohibitum*, and affixes a punishment to it if executed the common law adds to that statutory *malum prohibitum* and punishment a common law punishment, for attempting it, when the statute itself has not included an attempt within it, I apprehend is not supported by any authority or any view of the law; and I must think that it cannot be supposed in the high forum of a court of impeachment as making a high crime and misdemeanor, that the President of the United States, in determining what his powers and duties were in regard to filling offices, should have looked into the common law of the District of Columbia because the offices are inside of the District.

Then, upon the views presented of the conspiracy articles, let us see what the evidence is. There was no preparation or meditation of force; there was no application of force; there was no threat of force authorized on the part of the President; and there was no expectation of force, for he expected and desired nothing more and nothing less than that, by the peaceful and regular exercise of authority on his part, through the ordinary means of its exercise, he should secure obedience, and if, disappointed in that, obedience should not be rendered, all that the President desired or expected was that, upon that legal basis thus furnished by his official action, there should be an opportunity of taking the judgment of the courts of law.

Now, there seems to be left nothing but those articles that relate to the *ad interim* appointment of General Thomas and to the removal of Mr. Stanton. I will consider the *ad interim* appointment first, meaning to assume, for the purpose of examining it as a possible crime, that the office had been vacated and was open to the action of the President. If the office was full, then there could be no appointment by the authority of the President or otherwise. The whole action of the President manifestly was based upon the idea that the office was to be vacated before an *ad interim* appointment could possibly be made, or was intended to take effect.

The letter of authority accompanied the order of removal and was, of course, secondary and ancillary to the order of removal, and was only to take up the duties of the office and discharge them if the Secretary of War should leave the office in need of such temporary charge.

I think that the only circumstance we have to attend to before we look precisely at the law governing *ad interim* appointments is some suggestion as to any difference between *ad interim* appointments during the session of the Senate and during the recess. The honorable managers, perhaps all of them, but cer-

tainly the honorable manager, Mr. Boutwell, has contended that the practice of the government in regard to removals from office covered only the case of removals during the recess of the Senate. It will be part of my duty and labor when I come to consider definitely the question of the removal of Mr. Stanton to consider that point, but for the purpose of Mr. Thomas's appointment no such discrimination needs to be made. The question about the right of the Executive to vacate an office, as to be discriminated between recess and session, arises out of the constitutional distinction that is taken, to wit: that he can only fill an office during session by and with the advice and consent of the Senate, and that he can during the recess commission—it is not called filling the office, or appointing, but commission by authority, to expire with the next session.

But *ad interim* appointments do not rest upon the Constitution at all. They are not regarded, they never have been regarded as an exercise of the appointing power in the sense of filling an office. They are regarded as falling within either the executive or legislative duty of providing for a management of the duties of the office before an appointment is or can properly be made. In the absence of legislation it might be said that this power belonged to the Executive; that a part of his duty was, when he saw that accident had vacated an office or that necessity had required a removal, under his general authority and duty to see that the laws are executed, he should provide that the public service should be temporarily taken up and carried on. I do not think that that is an inadmissible constitutional conclusion.

But it might equally well be determined that it was a *casus omissus*, for which the Constitution had provided no rules and which the legislation of Congress might properly occupy. From the beginning, therefore, as early as 1792 and 1789, indeed, provision is made for temporary occupation of the duties of an office, and the course of legislation was this: the eighth section of the act of 1792, regulating three of the departments, provided that temporary absence and disabilities of the heads of departments, leaving the office still full, might be met by appointments of temporary persons to take charge. The act of 1795 provided that in case of a vacancy in the office there might be power in the Executive which would not require him to fill the office by the constitutional method but temporarily to provide for a discharge of its duties. Then came the act of 1863, which in terms covers to a certain extent but not fully both of these predicaments; and I wish to ask your attention to some circumstances in regard to the passage of that act of 1863. I have said that the eighth section of the act of 1792 provides for filling temporarily, not vacancies but disabilities. In January, 1863, the President sent to Congress this brief message, and senators will perceive that it relates to this particular subject:

To the Senate and House of Representatives:

I submit to Congress the expediency of extending to other departments of the government the authority conferred on the President by the eighth section of the act of the 8th of May, 1792, to appoint a person to temporarily discharge the duties of Secretary of State, Secretary of the Treasury, and Secretary of War, in case of the death, absence from the seat of government, or sickness of either of those officers.

ABRAHAM LINCOLN.

WASHINGTON, *January* 2, 1863.

That is to say, the temporary disability provision of the act of 1792, which covered all the departments then in existence, had never been extended by law to cover the other departments, and the President desired to have that act extended. The act of 1795 did not need to be extended, for it covered "vacancies" in its terms and was applicable to other departments, and vacancies were not in the mind of the President, nor was there any need of a provision of law for them. This message having been referred to the Judiciary Committee, the honorable senator from Illinois, [Mr. Trumbull,] the chairman of

Digitized by Google

that committee, made a very brief report; I believe this is the whole of it, or rather a brief statement in his place concerning it, in which he said:

> There have been several statutes on the subject, and as the laws now exist the President of the United States has authority temporarily to fill the office of Secretary of State and Secretary of War with one of the other Secretaries by calling some person to discharge the duties.

The other department was the Treasury.

> We received communications from the President of the United States asking that the law be extended to the other executive departments of the government, which seems to be proper; and we have framed a bill to cover all of those cases, so that whenever there is a vacancy the President may temporarily devolve the duty of one of the cabinet ministers on another cabinet minister, or upon the chief officer in the department for the time being.

Here there does not seem to have been brought to the notice in terms of the Senate or of the honorable senator the act of 1795; nothing is said of it; and it would appear, therefore, as if the whole legislation of 1863 proceeded upon the proposition of extending the act of 1792 as to disabilities in office, not vacancies, except that the honorable senator uses the phrase "vacancies," and that he speaks of having provided for the occasions that might arise. The act of 1863 does not cover the case of vacancies except by resignation, and it is not, therefore, a vacancy act in full. It does add to the disabilities which the President had asked to have covered, a case of resignation which he did not ask to have covered, and which did not need to be covered by new legislation, because the act of 1794 embraced it. But this act of 1863 does not cover all the cases of vacancy. It does not cover vacancies by removal, if removal could be made, and we supposed it could in 1863; it does not cover the case of expiration of office, which is a case of vacancy, provided there are terms to office.

Under that additional light it seems as if the only question presented of guilt on the part of the President in respect to the appointment to office *ad interim* was a question of whether he violated a law. But senators will remark the very limited form in which that question arises. It is not pretended that the appointment of Thomas, if the office was vacant, was a violation of the civil-tenure act; that is, it is not pretended in argument, although perhaps it may be so charged in the articles; because an examination of the act shows that the only appointments prohibited there, and the infringement of which is made penal, is appointing contrary to the provisions of that act, as was pointed out by my colleague, Judge Curtis, and seems to have been assented to in the argument on the other side; that an appointment prohibited, or an attempt at an appointment prohibited, relates to the infraction of the policy and provisions of that act as applied to the attempt to fill the offices that are declared to be in abeyance under certain predicaments. I believe that to be a sound construction of the law, whether assented to or not, not to be questioned anywhere.

Very well, then, supposing that the appointment of General Thomas was not according to law, it is not against any law that prohibits it in terms, nor against any law that has a penal clause or a criminal qualification upon the act. What would it be if attempted without authority of the act of 1795, because that was repealed, and without authority of the act of 1863, because General Thomas was not an officer that was eligible for this temporary employment? It would simply be that the President, in the confusion among these statutes, had appointed, or attempted to appoint, an *ad interim* discharge of the office without authority of law. You could not indict him very well for it, and I do not think you can impeach him for it. There are an abundance of mandatory laws upon the President of the United States, and it never has been customary to put a penal clause in them till the civil-tenure act of 1867.

But on this subject, the *ad interim* appointments, there is no penal clause and no positive prohibition in any statute. There would be, then, simply a defect of authority in the President to make the appointment. What, then, would be the consequence? General Thomas might not be entitled to discharge the

Digitized by Google

duties of the office; and if he had undertaken to give a certificate as Secretary *ad interim* to a paper that was to be read in evidence in a court, and a lawyer had got up and objected that General Thomas was not Secretary *ad interim*, and had brought the statutes, the certificate might have failed. That is all that can be claimed or pretended in that regard.

But we have insisted, and we do now insist, that the act of 1795 was in force; and that whether the act of 1795 was or was not in force, is one of those questions of dubious interpretation of implied repeal upon which no officer, humble or high, could be brought into blame for having an opinion one way or the other. And if you proceed upon these articles to execute a sentence of removal from office of a President of the United States, you will proceed upon an infliction of the highest possible measure of civil condemnation upon him personally, and of the highest possible degree of interference with the constitutionally elected Executive dependent on suffrage that it is possible for a court to inflict, and you will rest it on the basis either that the act of 1795 was repealed, or upon the basis that there was not a doubt or difficulty or an ignorance upon which a President of the United States might make an *ad interim* appointment of General Thomas for a day, followed by a nomination of a permanent successor on the succeeding day. Truly, indeed, we are getting very nice in our measure and criticism of the absolute obligations and of the absolute acuteness and thoroughness of executive functions when we seek to apply the process of impeachment and removal to a question whether an act of Congress required him to name a head of a department to take the vacant place *ad interim* or an act of Congress not repealed permitted him to take a suitable person. You certainly do not, in the ordinary affairs of life, rig up a trip-hammer to crack a walnut.

I think, Mr. Chief Justice, that I shall be able to conclude what I may have to say to the Senate further certainly within the compass of an hour; and as the customary hour of adjournment has been reached, I may, perhaps, be permitted to say that I feel somewhat sensibly the impression of a long argument.

Several SENATORS. Go on, go on.

Mr. HENDERSON. I move that the Senate adjourn.

The CHIEF JUSTICE. The senator from Missouri moves that the Senate, sitting as a court of impeachment, adjourn until to-morrow at 12 o'clock.

The motion was agreed to; and the Senate, sitting for the trial of the impeachment, adjourned.

FRIDAY, *May* 1, 1868.

The Chief Justice of the United States took the chair.

The usual proclamation having been made by the Sergeant-at-arms,

The managers of the impeachment on the part of the House of Representatives, and the counsel for the respondent, except Mr. Stanbery and Mr. Curtis, appeared and took the seats assigned to them respectively.

The members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

The journal of yesterday's proceedings of the Senate, sitting for the trial of the impeachment, was read.

The CHIEF JUSTICE. Senators will please give their attention. The counsel for the President will proceed with the argument.

Mr. EVARTS. Mr. Chief Justice and Senators, I cannot but feel that, notwithstanding the unfailing courtesy and the long-suffering patience which for myself

and my colleagues I have every reason cheerfully to acknowledge on the part of the court in the progress of this trial and in the long argument, you had at the adjournment yesterday reached somewhat of the condition of feeling of a very celebrated judge, Lord Ellenborough, who, when a very celebrated lawyer, Mr. Fearne, had conducted an argument upon the interesting subject of contingent remainders to the ordinary hour of adjournment, and suggested that he would proceed whenever it should be his lordship's pleasure to hear him, responded, "The court will hear you, sir, to-morrow; but as to pleasure, that has been long out of the question." [Laughter.]

Be that as it may, duties must be done, however arduous, and certainly your kindness and encouragement relieve from all unnecessary fatigue in the progress of the cause. We will look for a moment, under the light which I have sought to throw upon the subject, a little more particularly at the two acts, the one of 1795 and the other of 1863, that have relation to this subject of *ad interim* appointments. The act of 1795 provides:

That in case of vacancy in the office of Secretary of State, Secretary of the Treasury, or of the Secretary of the Department of War, or of any officer of either of the said departments, whose appointment is in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed or such vacancy be filled: *Provided*, That no one vacancy shall be supplied in manner aforesaid for a longer term than six months.

The act of 1863, which was passed under a suggestion of the President of the United States, not for the extension of the vacancy act which I have read to the other departments, but for the extension of the temporary-disability provision of the act of 1792, does provide as follows:

In case of the death, resignation, absence from the seat of government, or sickness of the head of any executive department of the government, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize—

Not "any person or persons," as is the act of 1795, but—

to authorize the head of any other executive department or other officer in either of said departments whose appointment is vested in the President, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such absence or disability by sickness shall cease: *Provided*, That no one vacancy shall be supplied in manner aforesaid for a longer term than six months.

It will be observed that the eighth section of the act of 1792, to which I will now call attention, being in 1 Statutes at Large, page 281, provides thus:

That in case of the death, absence from the seat of government, or sickness of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War Department, or of any officer of either of the said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease.

I am told, or I understand from the argument, that if there was a vacancy in the office of Secretary of War by the competent and effective removal of Mr. Stanton by the exercise of the President's authority in his paper order, there has come to be some infraction of law by reason of the President's designating General Thomas to the *ad interim* charge of the office, because it is said that though under the act of 1795, or under the act of 1792, General Thomas, under the comprehension of "any person or persons," might be open to the presidential choice and appointment, yet that he does not come within the limited and restricted right of selection for *ad interim* duties which is imposed by the act of 1863; and it seems to have been assumed in the argument that the whole range of selection permitted under that act was of the heads of departments. But your attention is drawn to the fact that it permits

Digitized by Google

the President to designate any person who is either the head of a department, or who holds any office in any department the appointment of which is from the President; and I would like to know why General Thomas, Adjutant General of the armies of the United States, holding his position in that Department of War, is not an officer appointed by the President, and open to his selection for this temporary duty; and I would like to know upon what principle of ordinary succession or recourse for the devolution of the principal duty any officer could stand better suited to assume for a day or for a week the discharge of the *ad interim* trust than the Adjutant General of the armies of the United States, being the staff officer of the President, and the person who stands there as the principal directory and immediate agent of the War Department in the exercise of its ordinary functions?

I cannot but think it is too absurd for me to argue to a Senate that the removal of a President of the United States should not depend upon the question whether an Adjutant General was a proper *locum tenens* or not, or whether entangled between the horns of the repealed and unrepealed statutes the President may have erred in that on which he hung his rightful authority.

Let me now call your attention now to an exercise of this power of *ad interim* appointment as held in the administration of President Lincoln, at page 582 of the record, before the enactment of the statute of 1863. You will observe that before the passing of the act of 1863 there was in force no statutory authority for the appointment of *ad interim* discharge of the offices except the acts of 1792 and 1795, which were limited in their terms to the Departments of War, of State, and of the Treasury. You have, therefore, directly in this action of President Lincoln the question of *ultra vires*, not of an infraction of a prohibitory statute with a penalty, but of an assumption to make an appointment without the adequate support of an enabling act of Congress to cover it, for he proceeded, as will be found at the very top of that page:

I hereby appoint St. John B. L. Skinner, now acting First Assistant Postmaster General, to be acting Postmaster General *ad interim*, in place of Hon. Montgomery Blair, now temporarily absent.

ABRAHAM LINCOLN.

WASHINGTON, *September* 22, 1862.

The Department of the Post Office was not covered by the acts of 1792 or 1795, and the absence of authority in respect to it and the other later organized departments formed the occasion of the President's message which led to the enactment of 1863. I would like to know whether, when President Lincoln appointed Mr. Skinner to be Postmaster General, without an enabling and supporting act of Congress to justify him, he deserved to be impeached, whether that was a crime against the Constitution and his oath of office, whether it was a duty due to the Constitution that he should be impeached, removed, and a new election ordered?

I cannot but insist upon always separating from these crimes alleged in articles the guilt that is outside of articles and that has not been proved, and that I have not answered for the respondent nor have been permitted to rebut by testimony. I take the thing as it is, and I regard each article as including the whole compass of a crime, the whole range of imputation, the whole scope of testimony and consideration; and unless there be some measure of guilt, some purpose, or some act of force, of violence, of fraud, of corruption, of injury, of evil, I cannot find in mistaken, erroneous, careless, or even indifferent excesses of authority making no impression upon the fabric of the government, and giving neither menace nor injury to the public service, any foundation for this extraordinary proceeding of impeachment.

Am I right in saying that an article is to contain guilt enough in itself for a verdict to be pronounced by the honorable members of the court "guilty" or "not guilty" on that article; guilty not of an act as named, but "guilty of a

high crime and misdemeanor as charged," and as the form of question adopted in the Peck and Chase trials is distinctly set down, and not the question used in the Pickering trial for a particular purpose, which has led the honorable manager, [Mr. Wilson,] to denounce it as a mockery of justice, a finding of immaterial facts, leaving no conclusions of law or judgment to be found by anybody.

There is another point of limitation on the authority of the President, as contained both in the act of 1795 and of 1863, which has been made the subject of some comment by the learned and honorable manager, [Mr. Boutwell:] it is that anyhow and anyway the President has been guilty of a high crime and misdemeanor, however innocent otherwise, because the six months' ability accorded to him by the act of 1795 or 1863 had already expired before he appointed General Thomas.

The reasoning I do not exactly understand; it is definitely written down and the words have their ordinary meaning, I suppose; but how it is that the President is chargeable with having filled a vacancy thus occurring on the 21st of February, 1868, if it occurred at all, by an appointment that he made *ad interim* on that day which was to run in the future, what the suggestion that the six months' right had expired rests upon, I do not understand. It is attempted to connect it in some way with a preceding suspension of Mr. Stanton under the civil-tenure act, which certainly did not create a vacancy in the office, as by law it was prohibited from doing, nor did it create in any form or manner a vacancy in the office. No matter, then, whether the suspension was under the civil-tenure-office act or the act of 1795, the office was not vacant until the removal; and whatever there may have been wanting in authority in that preceding action of the President as not sufficiently supported by his constitutional authority to suspend, which he claims, and as covered necessarily by the act of 1867, as is argued on the part of the managers, I cannot see that it has anything to do with cutting short the term during which it was competent for the President to make an *ad interim* appointment.

There remains nothing to be considered except about an *ad interim* appointment as occurring during the session of the Senate. An effort has been made to connect a discrimination between the session and the recess of the Senate in its operation upon the right of *ad interim* or temporary appointments, with the discrimination which the Constitution makes between the filling of an office during the session and the limited commission which is permitted during the recess. But sufficiently, I imagine, for the purposes of conviction in your minds, it has been shown that temporary appointment does not rest upon the constitutional provisions at all; that it is not a filling of the office, which remains just as vacant, as far as the constitutional right and duty remains or is divided in the different departments of the government, as if the temporary appointment had not been made. When the final appointment is made it dates as from and to supply the place of the person whose vacancy led to the *ad interim* appointment. That in the very nature of things there should be no difference in this capacity between recess and session sufficiently appears, and the acts of Congress draw no distinction, and the practice of the government makes not the least difference.

We are able to present to your notice on the pages of this record cases enough applicable to the very heads of departments to make it unnecessary to argue the matter upon general principles any further. Mr. Nelson, on the 29th of February, 1844, was appointed *ad interim* in the State Department during the session of the Senate. This is to be found on page 557. General Scott was appointed in the War Department July 23, 1850, page 558, during the session of the Senate; Moses Kelly, Secretary of the Interior, January 10, 1861, during the session of the Senate, at page 559; and Joseph Holt Secretary of War on the 1st of January, 1861, during the session of the Senate, at page 583. Whether these were to fill vacancies or for temporary disabilities makes

no difference on the question; nor how the vacancy arose, whether by removal or resignation or death.

The question of the *ad interim* faculty of appointment depends upon no such considerations. They were actual vacancies filled by *ad interim* appointment, and related, all except that of Moses Kelly, to departments that were covered by the legislation of 1792 and 1795. That of Moses Kelly to the Department of the Interior was not covered by that legislation, and would come within the same principle with the appointment of Mr. Skinner which I have noticed on page 582.

I now come with the utmost confidence, as having passed through all possible allegations of independent infraction of the statute, to the consideration of the removal of Mr. Stanton as charged as a high crime and misdemeanor in the first article, and as to be passed upon by this court under that imputation and under the President's defence. The crime as charged must be regarded as the one to be considered, and the crime as charged and also proved to be the only one upon which the judgment has to pass. Your necessary concession to these obvious suggestions relieves very much of any difficulty and of any protracted discussion this very simple subject as it will appear to be.

Before taking up the terms of the article and the consideration of the facts of the procedure I ask your attention now, for we shall need to use them as we proceed, to some general light to be thrown both upon the construction of the act by the debates of Congress and upon the relation of the cabinet as proper witnesses or proper aids in reference to the intent and purpose of the President within the practice of this government, and with the latter first.

Most extraordinary (as I think) views have been presented in behalf of the House of Representatives in relation to cabinet ministers. The personal degradation fastened upon them by the observation of the honorable manager [Mr. Boutwell] I have sufficiently referred to; but I recollect that there are in your number two other honorable senators, the honorable senator from Maryland [Mr. Johnson] and the honorable senator from Iowa, [Mr. Harlan,] who must take their share of the opprobrium which yesterday I divided among three members of this court alone.

But as a matter of constitutional right, of ability of the President to receive aid and direction from these heads of departments, it has been presented as a dangerous innovation, of a sort of Star Chamber council, I suppose, intruded into the Constitution, that was to devour our liberties. Well, men's minds change rapidly on all these public questions, and perhaps some members of this honorable Senate may have altered their views on that point from the time of the date of the paper I hold in my hand, to which I wish to ask your attention. It is a representation that was made to Mr. President Lincoln by a very considerable number of senators as to the propriety of his having a cabinet that could aid him in the discharge of his arduous executive duties:

> The theory of our government, the early and uniform practical construction thereof, is that the President should be aided by a cabinet council agreeing with him in political principle and general policy, and that all important measures and appointments should be the result of their combined wisdom and deliberation. The most obvious and necessary condition of things, without which no administration can succeed, we and the public believe does not exist; and, therefore, such selections and changes in its members should be made as will secure to the country unity of purpose and action in all material and essential respects. More especially in the present crisis of public affairs the cabinet should be exclusively composed of statesmen who are cordial, resolute, unwavering supporters of the principles and purposes above mentioned.

There are appended to this paper as it comes to me the signatures of 25 senators. Whether it was so signed or not I am not advised; but that it was the action of those senators, I believe, is not doubted, and among them there are some 15 or more that are members of this present court. The paper has no date, but the occurrence was, I think, some time in the year 1862 or 1863, a

Digitized by Google

transaction and a juncture which is familiar to the recollection of senators who took part in it, and doubtless of all the public men whom I have the honor now to address.

These honorable managers in behalf of the House of Representatives do not hold to these ideas at all, and I must think that the course of this court in its administration of the laws of evidence as not enabling the President to produce the supporting aid of his cabinet, which you said he ought to have in all his measures and views, has either proceeded upon the ground that his action, in your judgment, did not need any explanation or support, or else you had not sufficiently attended to these valuable and useful views about a cabinet which were presented to the notice of President Lincoln. Public rumor has said, the truth of which I do not vouch, as I have no knowledge, but there are many who well know that the President rather turned the edge of this representation by a suggestion whether in fact the meaning of the honorable senators was not that his cabinet should agree with them rather than with him, Mr. Lincoln. However that may be, the doctrines are good and are according to the custom of the country and the law of our government.

We may then find it quite unnecessary to refute by any very serious and prolonged argument the imputations and invectives against cabinet agreement with the President which have been urged upon your attention.

And now, as bearing both on the question of a fair right to doubt and deliberate on the part of the President on the constitutionality of this law, the civil-tenure act, and on the construction of its first section as embracing or not embracing Mr. Stanton, I may be permitted to attract your attention to some points in the debates in the Congress which have not yet been alluded to, as well as to repeat some very brief quotations which have once been presented to your attention. I will not recall the history of the action of the House on the general frame and purpose of the bill, nor the persistence with which the Senate, as one of the advisers of the President in the matters of appointment as well as a member of the legislative branch of the government, pressed the exclusion of cabinet ministers from the purview of the bill altogether; but when it was found that the House was persistent also in its view, the Senate concurred with it on conference in a measure of accommodation concerning this special matter of the cabinet which is now to be found in the text of the first section of the act. In the debate on the tenure-of-office bill the honorable senator from Oregon, [Mr. Williams,] who seems to have had, with the honorable senator from Vermont, [Mr. Edmunds,] some particular conduct of the debate according to a practice apparently quite prevalent now in our legislative halls, said this:

I do not regard the exception as of any great practical consequence—

That is, the exception of cabinet ministers—

because, I suppose, if the President and any head of a department should disagree, so as to make their relations unpleasant, and the President should signify a desire that that head of department should retire from the cabinet, that would follow without any positive act of removal on the part of the President. (Congressional Globe, 39th Congress, second session, p. 383.)

Mr. Sherman, bearing on the same point, said:

Any gentleman fit to be a cabinet minister, who receives an intimation from his chief that his longer continuance in that office is unpleasant to him, would necessarily resign. If he did not resign, it would show he was unfit to be there. I cannot imagine a case where a cabinet officer would hold on to his place in defiance and against the wishes of his chief. (Ibid., p. 1046.)

But, nevertheless, this practical lack of importance in the measures which induced the Senate to yield their opinions of regularity of governmental proceedings and permit a modification of the bill, led to the enactment as it now appears; and the question is how this matter was understood, not by one man, not by one speaker, but, so far as the record goes, by the whole Senate, on the question of construction of the act as inclusive of Mr. Stanton in his personal

incumbency of office or not. When the conference committee reported the section as it now reads, as the result of a compromise between the Senate in its firm views and the House in its firm purposes, the honorable senator from Michigan [Mr. Howard] asked that the proviso might be explained. Now, you are at the very point of finding out what it means when a senator gets so far as to feel a doubt, and wants to know and asks those who have charge of the matter and are fully competent to advise him. The honorable senator, Mr. Williams, states:

> Their terms of office shall expire when the term of office of the President *by whom they were* appointed expires.
>
> I have, from the beginning of this controversy, regarded this as quite an immaterial matter, for I have no doubt that any cabinet minister who has a particle of self-respect—and we can hardly suppose that any man would occupy so responsible an office without having that feeling—would decline to remain in the cabinet after the President had signified to him that his presence was no longer needed. As a matter of course, the effect of this provision will amount to very little, one way or the other; for I presume that whenever the President sees proper to rid himself of an offensive or disagreeable cabinet minister, he will only have to signify that desire, and the minister will retire, and a new appointment be made. (Ibid., p. 1515.)

Mr. Sherman, one of the committee of conference, states:

> I agreed to the report of the conference committee with a great deal of reluctance.
>
> I think that no gentleman, no man of any sense of honor, would hold a position as a cabinet officer after his chief desired his removal, and, therefore, the slightest intimation on the part of the President would always secure the resignation of a cabinet officer. For this reason I do not wish to jeopard this bill by an unimportant and collateral question.

He proceeds further:

> The proposition now submitted by the conference committee—

And this was in answer to the demand of the Senate to know from the committee what they had done, and what the operation of it was to be. The answer of Mr. Sherman is:

> The proposition now submitted by the conference committee is that a cabinet minister shall hold his office during the LIFE or TERM of the President who appointed him. *If the President dies the* cabinet goes out; if the *President is removed for* cause by impeachment the cabinet goes out; *at the expiration of the term of the President's office* the cabinet goes out.

This is found at page 1515 of the Globe of that year. Now, how in the face of this can we with patience listen to long arguments to show that, in regard to cabinet ministers situated as Mr. Stanton is, the whole object of limitation of the proviso and the bill to which the Senate was ready to assent becomes nugatory and unprotective of the President's necessary right, by a constructive enforcement against him of a continuing cabinet officer whom he never appointed at all? And how shall we tolerate this argument that the term of a President lasts after he is dead, and that the term in which Mr. Stanton was appointed by Mr. Lincoln lasts through the succeeding term to which Mr. Lincoln was subsequently elected? But that is not the point. You are asked to remove a President from office under the stigma of impeachment for crime, to strike down the only elected head of the government that the actual circumstances permit the Constitution to have recourse to, and to assume to yourselves the sequestration and administration of that office *ad interim* upon the guilt of a President in thinking that Mr. Sherman, in behalf of the conference committee, was right in explaining to the Senate what the conference committee had done. Nobody contradicted him; nobody wanted any further explanation; nobody doubted that there was no vice or folly in this act that, in undertaking to recognize a limited right of the President not to have ministers retained in office that he had not had some voice in appointing, gave it the shape, and upon these reasons, that it bears to-day.

And I would like to know who it is in this honorable Senate that will bear the issue of the scrutiny of the revising people of the United States on a removal from office of the President for his removal of an officer that the Senate has

thus declared not to be within the protection of the civil-tenure act. Agree that, judicially, afterward it may be determined anywhere that he is, who will pronounce a judgment that it is wrong to doubt? *Ego assentior eo*, the President might well say in deference to the opinion of Mr. Sherman, even if that judgment of some inferior court, to say nothing even of the highest, the Supreme Court, or the highest special jurisdiction, this court, should determine otherwise.

But the matter was brought up a little more distinctly. Mr. Doolittle having said that this proviso would not keep in the Secretary of War and that that had been asserted in debate as its object, Mr. Sherman, still having charge of the matter, as representing the conference committee, proceeds:

That the Senate had no such purpose was shown by its vote twice to make this exception. That this provision does not apply to the present case is shown by the fact that its language is so framed as *not to apply to the present President*. The senator shows that himself, and argues truly that it would not prevent the present President from removing the Secretary of War, the Secretary of the Navy, and the Secretary of State. And if I supposed that either of these gentlemen was so wanting in manhood, in honor, as to hold his place after the politest intimation by the President of the United States that his services were no longer needed, I, certainly, as a senator, would consent to his removal, and so would we all.

That is at page 1516 of the Globe; and yet later, in continuation of the explanation, the same honorable senator says thus definitely:

We provide that a cabinet minister shall hold his office, not for a fixed term, NOT until the Senate shall consent to his removal, *but as long as the power that appoints him holds office*. If *the principal office* is vacated, *the cabinet minister goes out*. (Page 1517.)

And if the principal office is not vacated by death under our government, we certainly belong to the race of the immortals. Now, senators, I press upon your consideration the inevitable, the inestimable weight of this senatorial discussion and conclusion. I do not press it upon particular senators who took part in it, especially. I press it upon the concurring, unresisting, assenting, agreeing, confirming, corroborating silence of the whole Senate. And I would ask if a President of the United States and his cabinet, having before them the question upon their own solution of the ambiguities or difficulties, if there be any, (and I think there are not,) in this section, might not well repose upon the sense of the Senate that they would not have agreed to the bill if it had any such efficacy as is now pretended for it, and the explanation of the committee, and the acceptance of it by the Senate that it had no such possible construction or force. Nevertheless, if the President must be convicted of a high crime and misdemeanor for this concurrence with your united judgments, and that sentence proceeds also from your united judgments, we shall have great difficulty in knowing which of your united judgments is entitled to the most regard.

In the House this matter was considered in the statements of Mr. Schenck, who with Mr. Williams and Mr. Wilson, now among the managers, constituted the conference committee, Mr. Williams having been, as is well known, one of the principal promoters of the original measure. Mr. Schenck states upon a similar inquiry made in the House as to what they had all done on conference:

A compromise was made by which a further amendment is added to this portion of the bill, so that the term of office of the heads of departments shall expire with the term of the President who appointed them, allowing those heads of departments one month longer, in which, in case of death or otherwise, other heads of departments can be named. This is the whole effect of the proposition reported by the committee of conference.

And again:

Their terms of office are limited, as they are not now limited, by law, so that they expire with the term of service of the President who appoints them and one month after. (Congressional Globe, second session thirty-ninth Congress, page 1340.)

Not the elected term, but "the term of service;" and if removal by impeachment terminates the term of service, as it certainly does, or death by a higher power equally terminates it, upon Mr. Schenck's view, in which apparently Messrs. Managers Wilson and Williams concurred, the House is presented as coming to the same conclusion with the Senate. Nevertheless, the whole grave

matter left of crime is an impeachment of the House for making the removal, and a condemnation sought from the Senate upon the same ground; and we are brought, therefore, to a consideration of the meaning of the act, of its constitutionality, of the right of the President to put its constitutionality in issue by proper and peaceful proceedings, or of his right to doubt and differ on the construction, and honestly, peacefully to proceed, as he might feel himself best advised, to learn what it truly meant.

And now I may here at once dispose of what I may have to say definitely in answer to some proposition insisted upon by the honorable manager, [Mr. Boutwell.] He has undertaken to disclose to you his views of the result of the debate of 1789, and of the doctrines of the government as there developed, and has not hesitated to claim that the limitation of those doctrines was confined to appointments during the recess of the Senate. Nothing could be less supported by the debate or by the practice of the government. In the whole of that debate, from beginning to end, there is not found any suggestion of the distinction that the honorable manager has not hesitated to lay down in print for your guidance as its result. The whole question was otherwise, whether or no the power of removal resided in the President absolutely. If it did, why should he not remove at one time as well as at another? The power of appointment was restricted in the Constitution by a distinction between recess and session. If, on the other hand, the power of removal was administrable by Congress, it needed to provide for its deposit with the President, if that was the idea, as well in time of session as in time of recess, because the whole question and action of the separate exercise of the power of removal from the power of appointment would arise when the emergency of removal dictated instant action. We understand that when the removal is political, or on the plan of rotation in office, as we call it, the whole motive of the removal is the new appointment.

The new appointment is the first thought and wish. There is no desire to get rid of the old officer except for the purpose of getting in the new. And therefore the general practice of the government in its mass of action, since the time of rotation in office began, is of this political removal, which is not getting rid of the old officer from any objection to him, but because his place is wanted for the new. Hence all this parade of the action of the government showing that it has been the habit in those political appointments to send in the name of the new man, and by that action put him in the place of the old, serves no purpose of argument, and carries not a penny's weight on the question. The form of the notice as in the last one on your table, the appointment of General Schofield, and so from the beginning of the office, is "in place of A B," not "to be removed by the Senate," but "of A B, removed," meaning this: "I, as President, have no power to appoint unless there is a vacancy; I tell you that I have made a vacancy or present to you a case of vacancy created by my will, by removal, not death or resignation; and I name to you C D to be appointed in the place of A B, removed." That is the meaning of that action of the government.

You will observe that in finding cases in the practice of the government where there has been a separate act of removal during session, or during recess either, we are under two necessary restrictions as to their abundance or frequency, which the nature of the circumstances imposes. The first is that in regard to cabinet officers you can hardly suppose an instant in which a removal can be possible, because in the language, honorable senators, you can hardly conceive of the possibility of a cabinet officer's not resigning when it is intimated to him that his place is wanted; and, therefore, all this tirade of exultation that we found no case of removal of a cabinet officer save that of Timothy Pickering rests upon Senator Sherman's proposition and Senator Williams's proposition that you cannot conceive of the possibility of there being a cabinet minister that would need to be removed, and the practice of our government has shown that

these honorable senators were right in their proposition, and that there never have been, from the foundation of the government to the present time, but two cases where there were cabinet ministers that on the slightest intimation of their chief did not resign. Now, do not urge on us the paucity of the cases of removal of heads of departments as not helping the practice of the government when that paucity rests upon retirement whenever a President desires it.

Mr. Pickering, having nothing but wild land for his support and a family to sustain, flatly told Mr. Adams that he would not resign, because it would not be convenient for him to make any other arrangements for a living until the end of his term; and the President, without that consideration of domestic reasons which perhaps Mr. Pickering hoped would obtain with him, told him that he removed him, and he did; and he went, I believe, to his wild land and was imprisoned there by the squatters, and came into very great disaster from this removal. Mr. Stanton, under the motives of public duty, it is said, takes the position that for public reasons he will not resign. These are the only two cases in our government in which the question has arisen, and in one of them, before the passage of the civil-tenure act, the Secretary was instantly removed by the power of the President, and in the other it was attempted after long sufferance.

We can find in the history of the government—for we should hardly expect to escape the occurrence when we have so many officers—instances enough of removal by Executive authority during the session of the Senate of subordinate officers of the government who derived their appointment from the President, by the advice and consent of the Senate, and every one of those cases is pertinent and an instance. You will observe in regard to them, as I said before, how peculiar must be the situation of the officer and office and of the President toward them when this separate, independent, and condemnatory removal needs to take place. In the first place, there must be some fault in the conduct of the officer, not necessarily crime, and not necessarily neglect of office, but some fault in manner at least, as of that collector down in Alabama, who, when he was asked by the Secretary of the department how far the Tombigbee ran up, answered that it did not run up at all, [laughter;] and he was removed from office for his joke on the subject of the Tombigbee river not running up, but, as other rivers do, running down. It does not do to have these asperities on the part of inferior officers. So, too, when the fault arises of peculation, of deficiency of funds, or what not, the sureties know of it, come forward and say to the officer, "You must resign; we cannot be sureties any longer here;" and in nine cases out of ten, where an occurrence would lead to removal, it is met by the resignation of the inferior officer. Therefore the practice of the government can expect to suggest only the peculiar cases where promptitude and necessity of the rough method of removal are alike demanded from the Executive. I will ask the attention of this honorable court to the cases we have presented in our proofs, with the page and instance of each removal during the session of the Senate. That is the condition of this list—the whole of it:

	Year.	Page.
Timothy Pickering	1800	558
Thomas Eastin, navy agent at Pensacola	1840	570
Isaac Henderson, navy agent	1864	569
James S. Chambers, navy agent	1864	569
Amos Binney	1826	573
John Thomas	1841	573
Samuel F. Marks	1860	581
Isaac V. Fowler	1860	582
Mitchell Steever	1861	582

I think the honorable senators must give their assent to the propositions I have made that in regard to cabinet officers it is almost impossible to expect removal as a separate act; that political removals necessarily have for their first

step the selection and presentation of the new man for whose enjoyment of office the removal is to take place; that in regard to criminality and necessity requiring instant removal of subordinate officers, resignation will then be required by their sureties or by their sense of shame or their disposition to give the easiest issue to the difficulty in which they are placed; and when with the circumstances of the matter reducing the dimensions of the possibility and the frequency within these narrow limits I present to you on behalf of the respondent these evidences of the action of this government during the session of the Senate, I think you must be satisfied with the proposition assented to by every statesman—I think assented to by every debater on the passage of this civil-tenure act: that the doctrine and the action and the practice of the government had been that the President removed in session or in recess, though some discrimination of that kind was attempted; but the facts, the arguments, the reasons all show that removal, if a right and if a power, is not discriminated between session and recess.

Look at it in regard to this point: the Senate is in session, and a public officer is carrying on his frauds at San Francisco or at New York, or wheresoever else, perhaps in Hong Kong or Liverpool, and it comes to the knowledge of the Executive; the session of the Senate goes on; the fact of his knowledge does not put him in possession of a good man to succeed him either in his own approval or in the assent of the new nominee; and if it is necessary under our Constitution that the consul at Hong Kong or at Liverpool, or the sub-treasurer at New York, or the master of the mint at San Francisco, should go on with his frauds until you and the President can find a man and send him there and get his assent and his qualifications, very well. It is not a kind of legislation that is adapted to the circumstances of the case is all that I shall venture to suggest. Whatever your positive legislation has done or attempted to do, no construction and no practice of the government while the executive department was untrammelled by this positive restriction has ever shown a discrimination between session and recess. Of course, the difference between session and recess is shown in the political appointments where, the object being the new appointment, the commission goes out in the recess; where, during the session, the object being the new appointment, it must proceed through the concurrence of the Senate.

And now that I come to consider the actual merits of the proceeding of the President and give a precise construction to the first section of the bill, I need to ask your attention to a remarkable concession made by Mr. Manager Butler in his opening, as we regarded it, that if the President, having this wish of removal, had accomplished it in a method the precise terms of which the honorable manager was so good as to furnish, then there would have been no occasion to have impeached him. It is not then, after all, the *fortiter in re* on the part of the President that is complained of, but the absence of the *suaviter in modo*; and you, as a court, upon the honorable manager's own argument, are reduced to the necessity of removing the President of the United States not for the act, but for the form and style in which it was done, just as the collector at Mobile was removed for saying that the river Tombigbee did not run up at all.

But more definitely the honorable manager [Mr. Boutwell] has laid down two firm and strong propositions—I will ask your attention to them—bearing on the very merits of this case. We argue that if this act be unconstitutional we had a right to obey the Constitution, at least in the intent and purpose of a peaceful submission of the matter to a court, and that our judgment on the matter, if deliberate, honest, and supported by diligent application to the proper sources of guidance, is entitled to support us against an incrimination. To meet that, and to protect the case against the injury from the exclusion of evidence that tends to that effect, the honorable manager [Mr. Boutwell] does not hesitate to say that the question of the constitutionality or unconstitutionality of the law does not make the least difference in the world where the point is that

an unconstitutional law has been violated, and for a President to violate an unconstitutional law is worthy of removal from office. Now, mark the desperate result to which the reasoning of the honorable managers, under the pressure of our argument, has reduced them. That is their proposition, and the reason for that proposition is given in terms. If that is not so; if the question of constitutionality or unconstitutionality in fact is permitted to come into your considerations of crime, then you would be punishing the President for an error of judgment, or releasing him or condemning him according as he happened to have decided right or wrong, and that the honorable manager tells us is contrary to the first principles of justice. Let us, before we get through with this matter, have some definite meeting of minds on this subject between these honorable managers and ourselves.

At page 72, vol. 2, in the argument of the honorable manager, [Mr. Boutwell,] we are told that "the crime of the President is not, either in fact or as set forth in the articles of impeachment, that he has violated a constitutional law; but his crime is that he has violated a law, and in his defence no inquiry can be made whether the law is constitutional," and that the Senate in determining innocence or guilt is to render no judgment as to the constitutionality of the act. I quote the results of his propositions, not the full language. At page 72, vol. 2, this is the idea:

> If the President may inquire whether the laws are constitutional, and execute those only which he believes to be so, then the government is the government of one man. If the Senate may inquire and decide whether the law is in fact constitutional, and convict the President if he has violated an act believed to be constitutional, and acquit him if the Senate think the law unconstitutional, then the President is, in fact, tried for his judgment, to be acquitted if, in the opinion of the Senate, it was a correct judgment, and convicted if, in the opinion of the Senate, his judgment was erroneous. This doctrine offends every principle of justice.

That doctrine does with us offend every principle of justice, that a President of the United States should be convicted when honestly, with proper advice, peacefully and deliberately, he has sought to raise a question between the Constitution and the law; and the honorable manager can escape from our argument on that point in no other mode than by the desperate recourse of saying that constitutional laws and unconstitutional laws are all alike in this country of a written Constitution, and that anybody who violates an unconstitutional law meets with some kind of punishment or other. This confusion of ideas as to a law being valid for any purpose that is unconstitutional I have already sufficiently exposed in a general argument. At page 72, vol. 2, he says:

> It is not the right of any senator in this trial to be governed by any opinion he may entertain of the constitutionality of the law in question.

You may all of you think the law is unconstitutional, and yet you have got to remove the President! "It has not been annulled by the Supreme Court." And you may simply inquire whether he has violated the law.

That is pretty hard on us that we cannot even go to the Supreme Court to find out whether it is unconstitutional, and we cannot regard it on our own oath of office as unconstitutional and proceed to maintain the obligation to sustain the Constitution, and you cannot look into the matter at all, but the unconstitutional law must be upheld!

> Nor can the President prove or plead the motive by which he professes to have been governed in his violation of the laws of the country.

What is the reason for that? He has taken an oath to preserve the Constitution, and therefore he cannot say that he acted under the Constitution and not under the law. His oath strikes him so that he cannot maintain the Constitution, and the Constitution cannot protect him.

A man who breaks an unconstitutional law on the ground that it is unconstitutional and that he has a right to break it, is "a defiant usurper."

Those are the propositions, and I think the honorable manager is logical; but

Digitized by Google

the difficulty is, that his logic drives him to an absurdity which, instead of rejecting, he adopts—a fault in reasoning which certainly we should not expect.

On the question of construction of the law, what are the views of the honorable managers as to the point of guilt or innocence? We have claimed that if the President in good faith construed this law as not including Mr. Stanton under its protection, and he went on upon that opinion, he cannot be found guilty. The honorable manager, [Mr. Boutwell,] at page 97, vol. 2, takes up this question and disposes of it in this very peculiar manner:

If a law—

I ask your attention to this:

If a law passed by Congress be equivocal or ambiguous in its terms, the Executive, being called upon to administer it, may apply his own best judgment to the difficulties before him, or he may seek counsel of his advisers or other persons; and, acting thereupon without evil intent or purpose, he would be fully justified—

We never contended for anything stronger than that—

he would be fully justified, and upon no principle of right could he be held to answer as for a misdemeanor in office.

Logic is a good thing, an excellent thing; it operates upon the mind without altogether yielding to the bias of feeling; and as we press an argument, however narrow it may be, if it be logical, the honorable managers seem obliged to bend to it, and in both cases have thrown away their accusation. Tell me, what more do we need than this, an ambiguous and equivocal law which the President was called on to act under, and might, as we tried to prove, "seek counsel from his official advisers or other proper persons, and acting thereupon without evil intent or purpose he would be fully justified, and upon no principle of right could he be held to answer as for a misdemeanor in office?" And what is the answer which the honorable managers make to this logical proposition? Why, that this act is not of that sort; it is as plain as the nose on a man's face, and it was nothing but violent resistance of light that led anybody outside of this Senate to doubt what it meant! The honorable manager who follows me [Mr. Bingham] will have an opportunity to correct me in my statements of their propositions, and to furnish an adequate answer, I doubt not, to the views I have had the honor now to present.

And now take the act itself, which is found at page 430 of the edition of the statutes I have before me. It is provided—

That every person holding any civil office, to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided.

Then the "provision otherwise" is:

Provided, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

That is the operative section of this act of erecting and limiting the new arrangement of offices. The section of incrimination, so far as it relates to removal, I will read, omitting all that relates to any other matter; the sixth section:

That every removal * * * contrary to the provisions of this act * * * shall be deemed, and is hereby declared to be, a high misdemeanor—

I altar the plural to singular—

And upon trial and conviction thereof, every person guilty thereof shall be punished by a fine not exceeding $10,000, or by imprisonment not exceeding five years, or both said punishments, in the discretion of the court.

You will observe that this act does not affix a penalty to anything but a "removal," an accomplished removal. Acts of a penal nature are to be con-

strued strictly; and yet whenever we ask that necessary protection of the liberty and of the property and of the life of a citizen of the United States under a penal statute, we are told that we are doing something extraordinary for a lawyer in behalf of his client. All principles, it seems, are to be changed when you have a President for a defendant; all the law retires, and will and object and politics assume their complete predominance and sway, and everything of law, of evidence, and of justice is narrow and not enlarged. That may be. All I can say is that if the President had been indicted under this act, or should hereafter be indicted under this act, then the law of the land would apply to his case as usually administered, and if he has not removed Mr. Stanton he cannot be punished for having done it. You might have punished an attempt to remove. See what you have done in regard to appointments:

> Every appointment or employment made, had, or exercised contrary to the provisions of this act, and the making, signing, sealing, countersigning, or issuing of any commission or letter of authority for, or in respect to any such appointment or employment, shall be deemed, and is hereby declared to be, a high misdemeanor.

There you have made not only an appointment, but an attempt on movement of the pen toward an appointment a crime, and you will punish it, I suppose, some day or other. But removal stands on act and fact. Now, what does the article charge in this behalf? for I believe as yet it has not been claimed that it is too narrow to insist that the crime as charged in the article shall be the one you are to try. "Removal" is not charged in the articles anywhere; the allegation is that Andrew Johnson did unlawfully and in violation of the Constitution "issue an order in writing for the removal of Edwin M. Stanton, with intent to violate" the civil-tenure act, and "with intent to remove him, the Senate being in session." If you had had a section of this statute that said "any removal, or the signing of any letter, or order, or paper, or mandate of removal, shall be a crime," then you would have had an indictment and a crime before you; but you have neither crime nor indictment, as appears from this first article. And yet it may be said that in so small a matter as the question of the removal of a President it does not do to insist upon the usual rules of construction of a criminal law. I understand the proposition to be this: that here is a criminal law which has been violated; that by the law of the land it has been violated, so that indictment could inculpate, verdict would find guilt, and sentence would follow at law; and that thereupon, upon that predicament of guiltiness, the President of the United States is exposed to this peculiar process of impeachment; and if I show that your law does not make punishable an attempt to remove, or a letter of removal, and that your article does not charge a removal, and that is good at law, then it is good against impeachment, or else you must come back to the proposition that you do not need a legal crime.

So much for the law. What is the true attitude of Mr. Stanton and of the President of the United States towards this office and this officer at the time of the alleged infraction of the law? Mr. Stanton held a perfectly good title to that office by the commission of a President of the United States to hold it, according to the terms of the commission, "during the pleasure of the President for the time being." That is the language of the commission. He held a good title to the office. A *quo warranto* moved against him while he held that commission unrevoked, unannulled, and undetermined would have been answered by the production of the commission. "I hold this office during the pleasure of the President of the United States for the time being, and I have not been removed by the President of the United States." That was the only title he held up to the passage of the civil-tenure act. By the passage of the civil-tenure act it is said that a statutory title was vested in him not proceeding from the executive power of the United States at all, not commissioned by the Executive of the United States at all, not to be found, ascertained, or delegated by the Executive of the United States at all, but a statutory title superadded to his

title from the executive authority which he held during pleasure, which gave him a durable office determinable only one month after the expiration of some term of years or other.

We are not now discussing the question whether he is within it or not. That being so, the first question to which I ask your attention is this, that the act is wholly unconstitutional and inoperative in conferring upon Mr. Stanton or anybody else a durable office to which he has never been appointed. Appointment to all office proceeds from the President of the United States, or such heads of department or such courts of law as your legislature may repose it in. You cannot administer appointment to office yourselves, for what the Constitution requires the President to have control of you cannot confer anywhere else. The appointment of Secretary of War is one which cannot be taken from the President and conferred upon the courts of law or the heads of departments. Whatever may be the action of Congress limiting or controling the office, as you please, the office itself is conferable only by the action of the Executive. And when Mr. Stanton holds or anybody else holds an office during pleasure, which he has received by commission and authority of the President of the United States a sufficient title to, you can no more confer upon him by your authority and appointment a title durable and *in invitum* as against the President of the United States, you can no more confer it upon him because he happens to be holding an office during pleasure than you could if he was out of office altogether. I challenge contradiction from the lawyers who oppose us and from the judgment of honorable and intelligent lawyers here. Where are you going to carry this doctrine of legislative appointment to office if you can carry it to find a man whom the President has never asked to hold an office except from day to day and can enact him into a durable office for life? You may determine tenures if you please; I am not now discussing that; you may determine tenures for life; but you cannot enact people into tenures for life. The President must appoint; and his discretion and his judgment in appointing to an office for life are very different from his discretion and his appointing to an office during his pleasure, which he can change at will. Now you will sweep all the offices of the country not only into the Senate but into Congress if you adopt this principle of enacting people into office; and if, upon the plea that there is an office at sufferance or at will, you can convert it in favor of the holder by an act of Congress into an estate for life or for years, you will appoint to office; and of that there can be no doubt.

The next question, and the only question, of constitutionality or construction (for the general question of the constitutional power to restrict appointments I shall not further trouble the Senate with) is, whether the Secretary of War is within the first section. The office of the Secretary of War is within the first section undoubtedly. The question, therefore, is whether the provisions concerning the office of Secretary of War applicable to that office are in their terms, giving them full course and effect, such as to hold Mr. Stanton in that office against the will of the President by the statutory term that is applicable to that office, and is or is not applied to him.

The argument that if Mr. Stanton is not within the proviso then he is within the body of the section stumbles over this transparent and very obvious, as we suppose, fallacy; the question of the law is whether the office of Secretary of War is within the proviso or not. You have not made a law about Mr. Stanton by name. The question, then, whether he is within one or the other terms of the alternative, is whether the office of Secretary of War is within the section or within the proviso; and will anybody doubt about that? It is on the same footing with the other secretaryships; it is on the same footing as an office with every other department. The question whether the office of Mr. Stanton or the office of Mr. Browning is within one or the other alternative of the section is not a question of construction of law, but a question of whether the facts of the tenure and

holding of the actual incumbency of the one or the other bring him within the proviso. If he is not brought within the proviso, his office being there, the fact that he is not in does not carry his office back into the first part, because his office would be back there for the future as well as for the past and for the present.

It is a statute made for permanent endurance, and the office of Secretary of War, now and forever, as long as the statute remains upon the book, is disposed of one way or the other within the first part or within the proviso. And yet we have been entertained, in public discussions as well as in arguments here, with what is supposed to be a sort of triumphant refutation, that Mr. Stanton's office in his actual incumbency is not protected by the proviso; that then his office is carried back under the body of the section. There is no doubt about the office being under the proviso. It says so:

Provided, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General, shall hold their offices respectively, &c.

That does not mean the men; it means the offices shall have that tenure. Having got along so far that this office of Secretary of War, like the office of Secretary of the Interior, must always remain under that proviso, and is never governable or to be governed by the body of the section, we have but one other consideration, and that is whether the proviso, which is the only part of the section that can operate upon the office of Secretary of War, so operates upon that office as to cover Mr. Stanton in a durable tenure for the future; and that turns upon the question whether the durability of tenure provided as a general rule for the office is in the terms of its limitation such as to carry him forward, or whether its bound has already been reached and he is out of it. That is the question of fact in the construction of the proviso. He either stays in the proviso or he drops out of the proviso; and if he personally drops out of the proviso in his present incumbency he cannot get back into the operative clause, because he cannot get back there without carrying his office there, and his office never can get back.

Is it not true that this proviso provides a different tenure for the cabinet officers from what the first and operative part of the section provides? If this office or this officer goes back, this very incumbent goes back; he gets a tenure that will last forever, that is, until the Senate consents to his removal. How absurd a result that is, to give to this poor President control of his cabinet, that those he appointed himself, if he should happen to be re-elected, he could get rid of in a month, and those that Mr. Lincoln appointed for him from the beginning, and before he had any choice in it, he must hold on to forever, till you consent that they shall go out; that those in regard to whom he had the choice of nomination he may by the expiration of the statutory term be freed from, but those that he had nothing to do with the appointment of shall last forever, till you consent to release him specifically from them. That is the necessary result of carrying him personally back, and Mr. Stanton would hold under the next President—if any of you can name him, I will supply in the argument his name—I can name several; whether it is the President that is to come in by removal from office, or the President by the election of the people in the autumn. Either way he would have a choice to relieve himself from the Secretaries. No; I think they would all then be in a shape for him, all having been appointed by somebody that had preceded him, and he would not have any chance at all.

Such absurdity, either in reasoning or practical result, can never be countenanced by the judgment of this court. If the office of the Secretary of War is within the proviso, and it certainly is, as it is not contended that the other Secretaries are not in their offices within it, then Mr. Stanton is or is not protected by the proviso. If he is not protected by the proviso his case is not provided for. Now, suppose this proviso had contained a second proviso following after the first, "and provided further, that the persons now holding the

Digitized by Google

offices of Secretary of War, &c., who were appointed and commissioned by Mr. Lincoln, shall not be deemed within the above proviso, which regulates the tenure of those offices," that would not have carried the offices back under the new tenure of the operative section, but simply have provided that, the offices being governed by the proviso, the incumbents, under the particular circumstances of their case, should not be even protected by the proviso; and this is the necessary construction of the act.

If this be the real construction, there is the end of the crime. If the construction be equivocal or ambiguous, the honorable manager [Mr. Boutwell] says it would be abhorrent to every sense of justice to punish the President for having erred in its construction; but being so plain a case that nobody can say two words on the one side or the other of it, it is mere assumption to say that there is a doubt or difficulty, and that an argument is necessary. Well, we certainly have belied on the one side and the other the proposition of this absolute plainness, for we have spent a great many words on this subject on the one side and the other. This being so, let us consider what the President did; and assuming that the statute covers Mr. Stanton's case, assuming that the removal of Mr. Stanton is prohibited by it under the penalties, let us see what the President did.

I have said to you that Mr. Stanton had a title to this office dependent on the President's pleasure. He claimed, or others claimed for him, that he had a tenure dependent on the statute. The question of dependence on the statute was a question to be mooted and determined as a novel one; the question of tenure by appointment was indubitable; and the President proposed to put himself in the attitude of reducing the tenure of Mr. Stanton to his statutory tenure at least. He therefore issues a paper which is a revocation of his commission, a recall of his office, as it depends on presidential appointment. Without that no question ever could be raised by any person upon the statutory tenure, because the presidential tenure would be an adequate answer to a *quo warranto*. The President then, peaceably and in writing, issued a paper which is served upon Mr. Stanton, saying, in effect, "I, the President of the United States, by such authority as I possess, relieve or remove you from the office of Secretary of War;" and that that recalled and terminated the commission and the title that was derived from presidential appointment nobody can deny.

Did the President proceed further? When Mr. Stanton, as he might reasonably have expected; when, as upon the evidence he did probably calculate, instead of adhering to his opinion that the tenure-of-office act was unconstitutional and that the tenure-of-office act did not include his title, refused to yield the only title that on Mr. Stanton's profession he held, to wit, the presidential appointment, to this recall, did the President then interpose force to terminate his statutory title, or did he, having thus reduced him to the condition of his statutory title then propose and then act either in submission to the power which Mr. Stanton had over him, or did he wish to have the question of the statutory title determined at law? It is enough to say that he did not do anything in the way of force; that he expected in advance, as appears by his statements to General Sherman, that Mr. Stanton would yield the office. Why should Mr. Stanton not yield it? The grounds on which he had put himself in August were that his duty required him to hold the office until Congress met; that is to hold it so that the presidential appointment could not take effect without your concurrence. Congress had met and was in session, and this "public duty" of Mr. Stanton, on his own statement had expired. Mr. Stanton had told him that the act was unconstitutional and had aided in writing the message that so disclosed the presidential opinion to you.

He had concurred in the opinion that he was not within the act. His retirement on this order would be in submission to these views, if not in submission to the views senators here had expressed that no man could be imagined who

Digitized by Google

would refuse to give up office in the cabinet when desired by the President; but if that predicament was excusable while this Senate was not in session to prevent a bad appointment, if that was feared, how could it be a reason when this Senate was in session? Mr. Stanton having stated to General Thomas on the first presentation of his credential that he wanted to know whether he desired him to vacate at once, or would give him time to remove his private papers, and that having been reported to the President, the President regarded it as all settled, and so informed his cabinet, as you have permitted to be given in evidence. After that, after the 21st, what act is charged in this article? Up to and through the 21st and the written order of removal and its delivery to Mr. Stanton, and the repose of the President upon that posture in which Mr. Stanton left it, what was done by the President about that office? Nothing whatever. There was a desire, an effort to seize upon a movement made by Mr. Stanton, based upon an affidavit, not that he had removed from office, but sworn to on the 21st, and again on the early morning of the 22d, that he was still in the office and held it against General Thomas, and instantly the President said, "Very well, the matter is in court."

It might have gone into court on the trial of an indictment against Thomas; but a speedier method was arrived at in the consultations of the President with his counsel, to have a *habeas corpus* carried forward before the Supreme Court, and jump at that. Then Mr. Chief Justice Carter, who, I take it, all who know him understand to be one who sees as far into a millstone as most people, put that cause out of his court by its own weight and the *habeas corpus* fell with it. That is all that is proved and all that is done. I submit to you, therefore, that the case of a resistance or violation of law does not at all arise. We do not even get to the position of whether a formal and peaceable violation, for the purpose of raising the question before the Supreme Court, was allowable. A revocation of the presidential title of Stanton was allowable; a resistance of the statutory title was not attempted; and the matter stood precisely as it would stand if a person was in the habit of cutting wood on your lot, and claimed a title to it, and meant to have a right to cut wood there, and before you went to law with him to determine the right in an action of trespass you were careful to withdraw a license terminable at will which you had given him and under which he was cutting wood. Withdraw your license before you bring your action of trespass or you will be beaten in it. Withdraw your license, and then he cuts upon his claim of right, and your action of trespass has its course and determines title. That was the situation.

All that is said about the right to violate unconstitutional laws never can have the footing for consideration, where all that is done by anybody is to put upon paper the case out of which, as an instance, the judgment of a court can be called for as to a violation or no violation. If there must be an intervention of force, then a law may be said to be violated and an offender must suffer, accordingly as it shall prove to be constitutional or unconstitutional. But where there is a Constitution as the predominant law, the statute as an inferior law, and an executive mandate is issued by the President in pursuance of either one law or the other, according to which is in force, for they both cannot be, we suppose, then he commits no violation of the law in thus presenting for consideration and determination the case.

We must, then, come either to intent, purpose, motive, some force prepared, meditated, threatened, or applied, or some evil invasion of the actual working of the department of the government in order to give substance to this allegation of fault. No such fact, no such intent, no such purpose is shown. We are prevented from showing the attendant views, information, and purpose upon which the President proceeded; and if so, it must be upon the ground that views, intent, and purpose do not qualify the act. Very well, then, carry it through so; let the managers be held to the narrowness of their charges when

they ask for judgment as they are when they exclude testimony, and let it be determined upon their reasoning on an article framed upon this plan, "that the President of the United States, well knowing the act to be unconstitutional, as in fact it is, undertook to make an appointment contrary to its provisions and conformable to the Constitution of the United States, with the intent that the Constitution of the United States should prevail in regard to the office in overthrow of the authority of the act of Congress, and thereupon and thereby, with an intent against which there can be no presumption, for he is presumed to have intended to do what he did do, we ask that for that purpose of obeying the Constitution rather than an invalid law he should be removed from office!"

And this absurdity is no greater than—for it is but a statement of—the propositions of law and of fact to which the honorable managers have reduced themselves in their theories of this cause, which exclude all evidence of intent or purpose and of effect and conduct, and take hold upon mere personal infraction of a statute of the United States, granting, for the purpose of argument, that it may be unconstitutional, and insisting that, under your judgments, it shall not make any difference whether it is unconstitutional or not. If that be so, then we have a right to claim that it is unconstitutional for the purposes of your judgment; and they agree that if you cannot so treat it and find us guilty, then it would be against the first principles of justice to punish us for an erroneous or mistaken opinion concerning constitutionality.

Now, the review of the evidence I do not purpose to weary you with. It all lies within the grasp of a handful on either side, and it will astonish you, if you have not already perused the record, how much of it depends upon the arguments or the debates of counsel, how little upon what is included in the testimony. Already your attention has been turned to the simplicity and folly, perhaps, of the conduct of General Thomas; already your attention must have fixed itself upon the fact that to prove this threatened *coup d'état* to overthrow the government of the United States and control the Treasury and the War Department you had to go to Delaware to prove a statement by Mr. Karsner that 20 days afterward Thomas said he would kick Stanton out. That is the fact; there is no getting over it. A *coup d'état* in Washington on the 21st of February, meditated, prepared, planned by military force, is proved by Karsner, brought from Delaware to say that on the 9th of March, in the east room, General Thomas said he meant to kick Stanton out. That phrase, disrespectful as it is, and undoubtedly intimating force, is rather of a personal than of a national act. [Laughter.] I submit that criticism is well founded. I think so. It comes up to a breach of the peace, provided it has been perpetrated. [Laughter.] But it does not come up to that kind of proceeding by which Louis Napoleon seized the liberties of the French republic; and we expected, under the heats under which this impeachment was found, that we should find something of that kind. The managers do not neglect little pieces of evidence, as is shown by their production of Mr. Karsner; and if they find this needle in a haystack and produce it as the sharp point of their case, there is nothing else, there is no bristling of bayonets under the hay-mow, you may be sure. Are there, then, any limits or discriminations in transactions of state? Are there public prosecutions, public dangers, public force, public menace? Undoubtedly there might be, and undoubtedly many who voted for impeachment supposed there were; and undoubtedly the people of the United States, when they heard there had been an impeachment voted, took it for granted there was something to appear. We have gone through it all. There is no defect of power nor of will. Every channel of the public information, even the newspapers, seem to be ardent and eager enough to aid this prosecution. Everybody in this country, all the people of the United States, are interested. They love their liberties; they love their government; and if anybody knew of anything that would bear on that question of force, the *coup d'état*, we should have heard it. We must, then,

Digitized by Google

submit, with great respect, that upon this evidence and upon these allegations there is no case made out of evil purpose, of large design of any kind, and no act that in form is an infraction of any law.

Now, what is the attitude which you must occupy toward each particular charge in these articles? Guilty or not guilty of a high crime and misdemeanor by reason of charges made and proved in that article; guilty of what the Constitution means as sufficient cause for removal of a President from office within that article. You are not to reach over from one article to another; you are to say guilty or not guilty of each as it comes along; and you are to take the first one as it appears; you are to treat it as within the premises charged and proved; you are to treat the President of the United States, for the purpose of that determination, as if he were innocent of everything else, of good politics and good conduct; you are to deal with him under your oath to administer impartial justice within the premises of accusation and proof as if President Lincoln were charged with the same thing, or General Grant, if the proposition that political gratitude is a lively sense of benefits expected leads men's minds forward rather than backward in the list of Presidents; you are to treat it as if the respondent were innocent, as if he were your friend, as if you agreed in public sentiment, in public policy; and nevertheless the crime charged and proved is such as that you will remove General Washington or President Lincoln for the same offence.

I am not to be told that it was competent for the managers to prove that there were *coup d'etats*, hidden purposes of evil to the state, threatened in this innocent and formal act apparently. Let them prove it, and then let us disprove it, and then judge us within the compass of the testimony and according to the law governing these considerations. But I ask you if I do not put it to you truly that within the premises of a charge and proof the same judgment must go against President Lincoln with his good politics, and General Washington with his majestic character, as against the respondent?

And so, as you go along from the first to the second article will you remove him for having made an error about the repeal or non-repeal of statutes in regard to appointments to office, if you can find a fault? I cannot see any fault under any of the forms of the statutes. If the power of removal of Mr. Stanton under the former practice of the government and unrestricted by this civil-tenure act existed, it existed during the session as well as during the recess. If that were debatable and disputable the prevailing opinion was that it covered, and the practice of the government shows that it covered, the removal during the session. At any rate, you must judge of this as you would have judged of Mr. Lincoln, if he had been charged with a high crime in appointing Mr. Skinner to be Postmaster General when there was not any authority under the appointment acts of the United States.

And this brings me very properly to consider, as I shall very briefly, in what attitude the President stands before you when the discussion of vicious politics or of repugnant politics, whichever may be right or wrong, is removed from the case. I do not hesitate to say that if you separate your feelings and your conduct, his feelings and his conduct, from the aggravations of politics as they have been bred since his elevation to the Presidency, under the peculiar circumstances which placed him there, and your views in their severity, governed, undoubtedly, by the grave juncture of the affairs of the country, are reduced to the ordinary standard and style of estimate that should prevail between the departments of this government, I do not hesitate to say that upon the impeachment investigations and upon the impeachment evidence you leave the general standing of the President unimpaired in his conduct and character as a man or as a magistrate. Agree that his policy has thwarted and opposed your policy, and agree that yours is the rightful policy; nevertheless, within the Constitution and within his right, and within his principles as belonging to him and known and understood when he was elevated to the office, I apprehend that

Digitized by Google

no reasonable man can find it in his heart to say that evil has been proved against him here. And how much is there in his conduct toward and for his country that up to this period of division commends itself not only to your but to the approval and applause of his countrymen? I do not insist upon this topic, but I ask you to agree with me in this: that his personal traits of character and the circumstances of his career have made him in opinion what he is, without learning, as it is said by his biographers, never having enjoyed a day's schooling in his life, devoted always to such energetic pursuits in the service of the State as commended him to the favor of his fellow-citizens and raised him step by step through all the gradations of the public service, and in every trial of fidelity to his origin and to the common interests proved faithful, struggling always in his public life against the aristocratic influences and oppressions which domineered so much in the section of country from which he came. He was always faithful to the common interest of the common people, and carried by his aid and efforts as much as any one else the popular measure of the homestead act against the southern policy and the aristocratic purposes of the governing interests of the south.

And I ask you to notice that, bred in a school of Tennessee democratic politics, he had always learned to believe that the Constitution must and should be preserved; and I ask you to recognize that when it was in peril, and all men south of a certain line took up arms against it, and all men north ought to have taken up arms in politics or in war for it, he loved the country and the Constitution more than he loved his section and the glories that were promised by the evil spirits of the rebellion. I ask you whether he was not as firm in his devotion to the Constitution when he said, in December, 1860:

> Then let us stand by the Constitution; and, in saving the Union, we save this, the greatest government on earth.

And whether, after the battle of Bull Run, he did not show as great an adhesion to the Constitution when he said:

> The Constitution—which is based on principles immutable, and upon which rest the rights of men and the hopes and expectations of those who love freedom throughout the civilized world—must be maintained.

He is no rhetorician and no theorist, no sophist and no philosopher. The Constitution is to him the only political book that he reads. The Constitution is to him the only great authority which he obeys. His mind may not expand; his views may not be so plastic as those of many of his countrymen; he may not think we have outlived the Constitution, and he may not be able to embrace the Declaration of Independence as superior and predominant to it. But to the Constitution he adheres. For it and under it he has served the State from boyhood up—labored for, loved it. For it he has stood in arms against the frowns of a Senate; for it he has stood in arms against the rebellious forces of the enemy; and to it he has bowed three times a day with a more than eastern devotion.

And when I have heard drawn from the past cases of impeachment and attempts at deposition, and 500 years have been spoken of as furnishing the precedents explored by the honorable managers, I have thought they found no case where one was impeached for obeying a higher duty rather than a written law regarded as repugnant to it, and yet, familiar to every child in this country, as well as to every scholar, a precedent much older comes much nearer to this expected entanglement. When the princes came to king Darius and asked that a law should be made that "whosoever shall ask any petition" "for 30 days, save of thee, O king, he shall be cast into the den of lions;" and when the plea was made that "the law of the Medes and Persians altereth not," and the minister of that day, the great head and manager of the affairs of the empire, was found still to maintain his devotion to the superior law, which made an infraction of the lower law, then was the case when the question was whether the power to

Digitized by Google

which he had been obedient was adequate to his protection against the power that he had disobeyed; and now the question is whether the Constitution is adequate to the protection of the President for his obedience to it against a law that the princes have ordained that seeks to assert itself against it. The result of that impeachment we all know, and the protection of the higher power was not withheld from the obedient servant.

The honorable manager, Mr. Wilson, in the very interesting and valuable report of the minority of the Judiciary Committee, entertains and warns the House of the fate of impeachment as turning always upon those who were ready with its axe and sword to destroy. He gives, in the language of Lord Caernarvon on Lord Danby's trial, a history of the whole force of them, and everybody is turned against in his turn that draws this sword. In this older case that I have referred to you may remember in the brief narrative that we have a history of the sequel of the impeachers:

> And they brought those men which had accused Daniel, and they cast them into the den of lions, them, their children, and their wives; and the lions had the mastery of them, and brake all their bones in pieces or ever they came at the bottom of the den.

This, then, senators, is an issue not of political but of personal guilt, within the limits of the charge and within the limits of the proof. Whoever decides it must so decide, and must decide upon that responsibility which belongs to an infliction of actual and real punishment upon the respondent. We all hold one the other in trust; and when the natural life is taken He who framed it demands "Where is thy brother?" And when under our frame of government, whereby the creation of all departments proceeds from the people, which breathes into these departments, executive and judicial, the breath of life; whose favor is yours as well as the President's, continuing force and strength, asks of you, as your sentence is promulgated, "Where is thy brother in this government whom we created and maintained alive?" no answer can be given that will satisfy them or will satisfy you, unless it be in truth and in fact that for his guilt he was slain by the sword of Constitution upon the altar of Justice. If that be the answer you are acquit; he is condemned; and the Constitution has triumphed, for he has disobeyed and not obeyed it, and you have obeyed and not disobeyed it.

Power does not always sway and swing from the same centre. I have seen great changes and great evils come from this matter of unconstitutional laws not attended to as unconstitutional, but asserted, and prevailing, too, against the Constitution, till at last the power of the Constitution took other form than that of peaceful, judicial determination and execution. I will put some instances of the wickedness of disobeying unconstitutional laws and of the triumph of those who maintained it to be right and proper.

I knew a case where the State of Georgia undertook to make it penal for a Christian missionary to preach the gospel to the Indians, and I knew by whose advice the missionary determined that he would preach the gospel and not obey the law of Georgia, on the assurance that the Constitution of the United States would bear him out in it; and the missionary, as gentle as a woman, but as firm as every free citizen of the United States ought to be, kept on preaching to the Cherokees.

And I knew the great leader of the moral and religious sentiment of the United States, who, representing in this body, and by the same name and of the blood of one of its distinguished senators now, [Mr. Frelinghuysen,] the State of New Jersey, tried hard to save his country from the degradation of the oppression of the Indians at the instance of the haughty planters of Georgia. The Supreme Court of the United States held the law unconstitutional and issued its mandate, and the State of Georgia laughed at it and kept the missionary in prison, and Chief Justice Marshall and Judge Story and their colleagues hung their heads at the want of power in the Constitution to maintain the departments

of it. But the war came, and as from the clouds from Lookout Mountain swooping down upon Missionary Ridge came the thunders of the violated Constitution of the United States, and the lightnings of its power over the still home of the missionary Worcester, taught the State of Georgia what comes of violating the Constitution of the United States.

I have seen an honored citizen of the State of Massachusetts, in behalf of its colored seamen, seek to make a case by visiting South Carolina to extend over those poor and feeble people the protection of the Constitution of the United States. I have seen him attended by a daughter and grandchild of a signer of the Declaration of Independence and a framer of the Constitution, who might be supposed to have a right to its protection, driven by the power of Charleston and the power of South Carolina, and the mob and the gentlemen alike, out of that State and prevented from making a case to take to the Supreme Court to assert the protection of the Constitution. And I have lived to see the case thus made up determined that if the Massachusetts seamen, for the support of slavery, could not have a case made up, then slavery must cease; and I have lived to see a great captain of our armies, a gentleman of the name and blood of Sherman, sweep his tempestuous war from the mountain to the sea, and returning home trample the State of South Carolina beneath the tread of his soldiery; and I have thought that the Constitution of the United States had some processes stronger than civil mandates that no resistance could meet. I do not think the people of Massachusetts suppose that efforts to set aside unconstitutional laws and to make cases for the Supreme Court of the United States are so wicked as is urged here by some of its representatives; and I believe that if we cannot be taught by the lessons we have learned of obedience to the Constitution in peaceful methods of finding out its meaning, we shall yet need to receive some other instruction on the subject.

The strength of every system is in its weakest part. Alas for that rule! But when the weakest part breaks, the whole is broken. The chain lets slip the ship when the weak link breaks, and the ship founders. The body fails when the weak function is vitally attacked; and so with every structure, social and political, the weak point is the point of danger, and the weak point of the Constitution is now before you in the maintenance of the co-ordination of the departments of the government, and if one cannot be kept from devouring another then the experiment of our ancestors will fail. They attempted to interpose justice. If that fails, what can endure?

We have come all at once to the great experiences and trials of a full-grown nation, all of which we thought we should escape. We never dreamed that an instructed and equal people, with freedom in every form, with a government yielding to the touch of popular will so readily, ever would come to the trials of force against it. We never thought that what other systems from oppression had developed—civil war—would be our fate without oppression. We never thought that the remedy to get rid of a despotic ruler fixed by a Constitution against the will of the people would ever bring assassination into our political experience. We never thought that political differences under an elective Presidency would bring in array the departments of the government against one another to anticipate by ten months the operation of the regular election. And yet we take them all, one after another, and we take them because we have grown to the full vigor of manhood, when the strong passions and interests that have destroyed other nations, composed of human nature like ourselves, have overthrown them. But we have met by the powers of the Constitution these great dangers—prophesied when they would arise as likely to be our doom—the distractions of civil strife, the exhaustions of powerful war, the intervention of the regularity of power through the violence of assassination. We could summon from the people a million of men and inexhaustible treasure to help the Constitution in its time of need. Can we summon now resources enough of

civil prudence and of restraint of passion to carry us through this trial, so that whatever result may follow, in whatever form, the people may feel that the Constitution has received no wound! To this court, the last and best resort for this determination, it is to be left. And oh, if you could only carry yourselves back to the spirit and the purpose and the wisdom and the courage of the framers of the government, how safe would it be in your hands? How safe is it now in your hands, for you who have entered into their labors will see to it that the structure of your work comports in durability and excellency with theirs. Indeed, so familiar has the course of the argument made us with the names of the men of the convention and of the first Congress that I could sometimes seem to think that the presence even of the Chief Justice was replaced by the serene majesty of Washington, and that from Massachusetts we had Adams and Ames, from Connecticut, Sherman and Ellsworth, from New Jersey, Paterson and Boudinot, and from New York, Hamilton and Benson, and that they were to determine this case for us. Act, then, as if under this serene and majestic presence your deliberations were to be conducted to their close, and the Constitution was to come out from the watchful solicitude of these great guardians of it as if from their own judgment in this high court of impeachment.

Mr. POMEROY. I move that the Senate take a recess for 15 minutes.

The motion was agreed to; and at the expiration of the recess the Chief Justice resumed the chair and called the Senate to order.

Mr. STANBERY appeared with the counsel for the respondent.

Mr. SHERMAN. I move a call of the Senate.

The motion was agreed to, and the roll of senators was called.

The CHIEF JUSTICE. Forty senators have answered to their names. Senators will please give their attention. The counsel for the President will proceed.

Hon. HENRY STANBERY, on behalf of the respondent, addressed the Senate as follows:

Mr. Chief Justice and Senators, it may seem an act of indiscretion almost amounting to temerity that in my present state of health I should attempt the great labor of this case. I feel that in my best estate I could hardly attain to the height of the great argument. Careful friends have advised me against it. My watchful physician has yielded a half reluctant consent to my request, accompanied with many a caution that I fear I shall not observe. But, senators, an irresistible impulse hurries me forward. The flesh indeed is weak; the spirit is willing. Unseen and friendly hands seem to support me. Voices inaudible to all others, I hear, or seem to hear. They whisper words of consolation, of hope, of confidence. They say, or seem to say to me: "Feeble champion of the right, hold not back; remember that the race is not always to the swift nor the battle to the strong; remember in a just cause a single pebble from the brook was enough in the sling of the young shepherd."

Senators, in all our history as a people, never before have the three great departments of the government been brought on the scene together for such an occasion as this. We have had party strifes in our history before. Many a time the executive and legislative departments have been in fierce and bitter antagonism. Many a time before a favorite legislative policy has been thwarted and defeated by the persistent and obstinate efforts of an Executive. Many a time before extreme party men have advised a resort to impeachment. Even as far back as the time of Washington his grand and tranquil soul was disturbed in that noted year, 1795, when he stood in antagonism with a majority in the House of Representatives upon that famous British treaty, when, upon their demand, he refused to surrender the correspondence, impeachment by the bad men of the party was then threatened. So, too, in many a subsequent day of our party contests. Oftentimes in the remembrance of men not older than myself, oftentimes when to accomplish the purposes of the party there seemed

to be this way and no other way, have we heard this same advice given, "This is the remedy to follow;" but, happily for us, such bad counsels never heretofore have prevailed.

This undoubtedly is a remedy within the contemplation of the Constitution, a remedy for a great mischief. Our wise forefathers saw that a time might come, an emergency might happen when nothing but the removal of the Chief Magistrate could save the nation; but they never made it to be used for party purposes. Has the time come now; has, after the lapse of eighty years, the time at last come when this extreme remedy of the Constitution must be applied? If so, all just men will say, amen. But if, on the contrary, bad advice has at last prevailed, if this is a step at last in the interests of party, carried by the bad advice of the worst men of the party, if at last this great and august tribunal is to be degraded to carry out a party purpose, oh, then there remains a day of retribution for every man that participates in this great wrong, sure to come, nor long to be delayed.

But let me not anticipate the character of the case. Let us look at it as it develops itself. I listened with great attention to the persistent efforts of my learned friends, the managers, to convince you, senators, that you are not sitting in a judicial capacity, that all the ordinary forms in the administration of justice are laid aside. They told you again and again there was no right of challenge here. What if there was not? Ah, does not your duty then become the more solemn, your obligation the stronger to take care when the accused cannot protect himself that you will protect him? With the greatest care and perseverance they strike out all the forms that pertain to judicial proceeding; they say they do not belong here. What if they do not? What is that to you, senators, who with your upraised hands have invoked your God to witness that you will impartially try and decide this case? What are these forms to you? Strike them all out, and deeper and deeper that oath strikes in.

Mr. Stanbery proceeded with his argument (which will be published entire when completed) until past 4 o'clock, when he said:

I dislike very much to ask favors, but if it be the pleasure of the Senate to adjourn, I shall detain them but a short time to-morrow, and it will be a great favor to me, a very great favor.

Mr. GRIMES. Mr. Chief Justice, I move that the Senate, sitting as a court of impeachment, now adjourn.

The motion was agreed to, and the Senate, sitting for the trial of the impeachment, adjourned.

SATURDAY, *May* 2, 1868.

The Chief Justice of the United States took the chair.

The usual proclamation having been made by the Sergeant-at-arms,

The managers of the impeachment on the part of the House of Representatives and the counsel for the respondent, except Mr. Curtis, appeared and took the seats assigned to them respectively.

The members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

The journal of yesterday's proceedings of the Senate, sitting for the trial of the impeachment, was read.

The CHIEF JUSTICE. The counsel will proceed with the argument. Senators will please give their attention.

Mr. STANBERY. Mr. Chief Justice, first of all, senators, I must return my

Digitized by Google

thanks for the very great kindness shown me yesterday. I was greatly in need of it. I am greatly benefited by the rest it has afforded me. I feel refreshed and better prepared, though at last how poorly, for the work that yet lies before me. Nevertheless your courtesy, so kindly, so cheerfully extended, I shall not soon forget.

And now, senators, before I enter upon this case I must be allowed to speak in advance my deliberate opinion of the case itself, not in the way of rhodomontade, not that I hope to carry anything before a body like this by the mere expression of confidence; not at all; but still, having examined this case from beginning to end, having looked through it in all its parts, I feel ready to say that there is not only no case, but no shadow of a case. Oh! for an hour of my ancient vigor, that I might make this declaration good; but poorly prepared I hope to make it good to the satisfaction of the Senate that now hear me.

Mr. Stanbery resumed and concluded the argument commenced by him yesterday, which is as follows:

Mr. CHIEF JUSTICE and SENATORS: It is the habit of the advocate to magnify his case; but this case best speaks for itself. For the first time in our political existence, the three great departments of our government are brought upon the scene together; the House of Representatives as the accusers; the President of the United States as the accused; the judiciary department, represented by its head, in the person of the Chief Justice; and the Senate of the United States as the tribunal to hear the accusation and the defence, and to render the final judgment. The Constitution has anticipated that so extreme a remedy as this might be necessary, even in the case of the highest officer of the government. It was seen that it was a dangerous power to give one department to be used against another department. Yet, it was anticipated that an emergency might arise in which nothing but such a power could be effectual to preserve the republic. Happily for the eighty years of our political existence which have passed no such emergency has hitherto arisen. During that time we have witnessed the fiercest contests of party. Again and again the executive and the legislative departments have been in open and bitter antagonism. A favorite legislative policy has more than once been defeated by the obstinate and determined resistance of the President. Upon some of the gravest and most important issues that we have ever had, or are ever likely to have, the presidential policy and the legislative policy have stood in direct antagonism. During all that time this fearful power was in the hands of the legislative department, and more than once a resort to it has been advised by extreme party men as a sure remedy for party purposes; but, happily, that evil hitherto has not come upon us.

What new and unheard of conduct by a President has at last made a resort to this extreme remedy unavoidable? What presidential acts have happened so flagrant that all just men of all parties are ready to say "the time has come when the mischief has been committed; the evil is at work so enormous and so pressing that in the last year of his term of office it is not safe to await the coming action of the people?" If such a case has happened, all honorable and just men of all parties will say amen; but if, on the contrary, it should appear that this fearful power has at last been degraded and perverted to the use of a party; if it appears that at last bad advice, often before given by the bad men of party, has found acceptance, this great tribunal of justice, now regarded with so much awe, will speedily come to be considered as a monstrous sham. If it should be found to be the willing instrument to carry out the purposes of its party, then there remains for it and for every one of its members who participates in the great wrong a day of awful retribution, sure to come, nor long to be delayed. But I will not anticipate nor speak further of the case itself until its true features are fully developed.

Digitized by Google

THE ARTICLES.

I now proceed to a consideration of the articles of impeachment:

They are eleven in number. Nine of them charge acts which are alleged to amount to a *high misdemeanor in office*. The other two, namely the *fourth* and *sixth*, charge acts which are alleged to amount to a *high crime in office*. It seems to be taken for granted that, in the phrase used in the Constitution, "other high crimes and misdemeanors," the term *high* is properly applicable as well to misdemeanors as to crimes.

The acts alleged in the 11 articles as amounting to high misdemeanors or high crimes are as follows:

In article one, the issuing of the order of February 21, 1868, addressed to Stanton, "for the removal" of Stanton from office, with intent to violate the tenure-of-office act and the Constitution of the United States, and to remove Stanton.

In article two, the issuing and delivering to Thomas of the letter of authority of February 21, 1868, addressed to Thomas, with intent to violate the Constitution of the United States and the tenure-of-office act.

In article three, the appointing of Thomas by the letter addressed to him of the 21st of February, 1868, to be Secretary of War *ad interim*, with intent to violate the Constitution of the United States.

In article four, conspiring with Thomas with intent, by intimidation and threats, to hinder Stanton from holding his office, in violation of the Constitution of the United States and the conspiracy act of July 31, 1861.

In article five, conspiring with Thomas to hinder the execution of the tenure-of-office act, and, in pursuance of the conspiracy, attempting to prevent Stanton from holding his office.

In article six, conspiring with Thomas to seize by force the property of the United States in the War Department, then in Stanton's custody, contrary to the conspiracy act of 1861, and with intent to violate the tenure-of-office act.

In article seven, conspiring with Thomas with intent to seize the property of the United States in Stanton's custody with intent to violate the tenure-of-office act.

In article eight, issuing and delivering to Thomas the letter of authority of February 21, 1868, with intent to control the disbursements of the money appropriated for the military service and for the War Department, contrary to the tenure-of-office act and the Constitution of the United States, and with intent to violate the tenure-of-office act.

In article nine, declaring to General Emory that the second section of the army appropriation act of March 2, 1867, providing that orders for military operations issued by the President or Secretary of War should be issued through the General of the army, was unconstitutional and in contravention of Emory's commission, with intent to induce Emory to obey such orders as the President might give him directly and not through the General of the army, with intent to enable the President to prevent the execution of the tenure-of-office act, and with intent to prevent Stanton from holding his office.

In article ten, that, with intent to bring in disgrace and contempt the Congress of the United States and the several branches thereof, and to excite the odium of the people against Congress and the laws by it enacted, he made three public addresses, one at the Executive Mansion on the 18th of August, 1866, one at Cleveland on the 3d of September, 1866, and one at St. Louis on the 8th of September, 1866, which speeches are alleged to be peculiarly indecent and unbecoming in the Chief Magistrate of the United States, and by means thereof the President brought his office into contempt, ridicule, and disgrace, and thereby committed and was guilty of a high misdemeanor in office.

In article eleven, that, by the same speech made on the 18th of August, at

Digitized by Google

the Executive Mansion, he did, in violation of the Constitution, attempt to prevent the execution of the tenure-of-office act, by unlawfully contriving means to prevent Stanton from resuming the office of Secretary for the Department of War, after the refusal of the Senate to concur in his suspension, and by unlawfully contriving and attempting to contrive means to prevent the execution of the *act making appropriations for the support of the army*, passed March 2, 1867, and to prevent the execution of the *act to provide for the more efficient government of the rebel States*, passed March 2, 1867.

It will be seen that all of these articles, except the tenth, charge violations either of the Constitution of the United States, of the tenure-of-office act, of the conspiracy act of 1861, of the military appropriation act of 1867, or the of the reconstruction act of March 2, 1867. The tenth article, which is founded on the three speeches of the President, does not charge a violation either of the Constitution of the United States or of any act of Congress. Five of these articles charge a violation of the Constitution, to wit, articles one, two, three, four, and eight. Seven of these articles charge violations of the tenure-of-office act, to wit, articles one, two, five, six, seven, eight, nine, and eleven. Two of the articles charge a violation of the conspiracy act of 1861; to wit, articles four and six. Two of them charge violations of the appropriation act of March 2, 1867, to wit, articles nine and eleven. One only charges a violation of the reconstruction act of March 2, 1867, and that is article eleven.

We see, then, that four statutes of the United States are alleged to have been violated. Three of these provide for penalties for their violation, that is to say, the tenure-of-office act, the conspiracy act of 1861, and the military appropriation act of March 2, 1867. The violation of the tenure-of-office act is declared by the act itself to be a "high misdemeanor." The violation of the conspiracy act is declared to be "a high crime." The violation of the second section of the military appropriation act is declared to be simply "a misdemeanor in office."

It will be observed that the first eight articles all relate to the War Department, and to that alone. Article one sets out an attempted removal of the head of that department. Three others relate to the *ad interim* appointment of Thomas to be acting Secretary of that department. The four others relate to conspiracies to prevent Stanton from holding his office as Secretary for the Department of War, or to seize the public property in that department, or to control the disbursements of moneys appropriated for the services of that department.

Now, first of all, it must not escape notice that these articles are founded upon the express averment that from the moment of his reinstatement on the non-concurrence of the Senate Mr. Stanton became the lawful Secretary for that department; that, upon such order of the Senate, he at once entered into possession of the War Department and into the lawful exercise of its duties as Secretary, and that up to the date of the articles of impeachment that lawful right and actual possession had remained undisturbed; that all the acts charged in these eight articles were committed during that time; that, notwithstanding these acts, Stanton remains lawfully and actually in possession; and that the office has been at no time vacant.

We see, then, that, according to the case made in these eight articles, the President did not succeed in getting Mr. Stanton out of office or of putting General Thomas in, either in law or in fact. We see, according to these articles, that the President did not succeed, either by force or otherwise, in preventing Mr. Stanton from holding his office or in getting possession of the public property in that department or in controlling the disbursements of public money appropriated for the use of that department. There has been, according to the very case made in these articles, no public mischief. The lawful officer has not been disturbed; the lawful custody of the public property and public money of the department has not been changed. No injury has been done either to the

public service or to the public officer. There has been no removal of Mr. Stanton—only an abortive attempt at removal. There has been no acting Secretary put in an office vacant by death, resignation, or disability—put there during the time of such actual vacancy or temporary absence. All the time the Secretary himself has been there in the actual performance of his duties. No *ad interim* officer has, in law or fact, been constituted, for in law or fact there has been no *interim* as to the Secretary himself. There has been no moment of time in which there could be an acting Secretary or an *ad interim* Secretary, either in law or fact, for it is impossible to conceive of an *ad interim* Secretary of War when there is no *interim*, that is, when the lawful Secretary is in his place and in the actual discharge of his duties.

Mark it, then, senators, that the acts charged as high crimes and misdemeanors in these eight articles, in respect to putting Mr. Stanton out and General Thomas in, are things *attempted* and *not* things *accomplished*. It is the attempt, and the unlawful intent with which it was formed, that the President is to be held responsible for. So that it comes to be a question of vital consequence in reference to this part of the case whether the high crimes and misdemeanors provided for in the tenure-of-office act and in the second section of the military appropriation act purport to punish not only the commission of the acts, but to punish as well the abortive attempt to commit them.

I limit myself in what has been said to the four articles touching the removal of Mr. Stanton and the appointment of General Thomas. As to the four conspiracy articles, there can be no question that the actual accomplishment of the thing intended is not made necessary to constitute the offence; for the statute against conspiracies expressly provides for the punishment of the unlawful intent, the unlawful conspiracy itself, without reference to any further act done in pursuance of it, or to the partial or complete accomplishment of the unlawful design. But, contrariwise, the other two acts do not punish the intent alone, but only the commission of the thing intended; and the offence provided for in these two acts, while it requires the unlawful intent to be a part of the crime, requires something else to supplement it, and that is the actual commission of the thing intended.

And here, senators, before I proceed to consider these articles in detail, seems to me the proper time to bring your attention to another consideration, which I deem of very great moment. What is the subject-matter which constitutes these high crimes and misdemeanors? Under what legislation does it happen that the President of the United States is brought under all this penal liability? What are these high crimes and misdemeanors? Has he committed treason or bribery? Has he been guilty of peculation, or oppression in office? Has he appropriated the public funds or the public property unlawfully to his own use? Has he committed any crime of violence against any person, public officer, or private individual? Is he charged with any act which amounts to the *crimen falsi* or was done *causa lucri*? Nothing of the sort. These alleged high crimes and misdemeanors are all founded upon mere forms of executive administration—for the violation, they say, of the rules laid down by the legislative department to regulate the conduct of the executive department in the manner of the administration of executive functions belonging to that department.

The regulations so made purport to change what theretofore had been the established rule and order of administration. Before the passage of the second section of the military appropriation act the President of the United States, as Commander-in-chief of the army and head of the executive department, issued his orders for military operations either directly to the officer who was charged with the execution of the order or through any intermediate channel that he deemed necessary or convenient. No subordinate had a right to supervise his order before it was sent to its destination. He was not compelled to consult his Secretary of War, who was merely his agent, nor the general next to him-

Digitized by Google

self in rank as to that important thing, the subject-matter of his order, or, that merely formal thing, the manner of its transmission. But, by this second section, the mere matter of form is attempted to be changed. The great power of the President as Commander-in-chief to issue orders to all his military subordinates is respected. The act tacitly admits that over these great powers Congress has no authority. The substance is not touched, but only the form is provided for; and it is a departure from this mere form that is to make the President guilty of a high crime and misdemeanor.

Then, again, as to the tenure-of-office act, that also purports to introduce a new rule in the administration of the executive powers. It does not purport to take away the President's power of appointment or power of removal absolutely; but it purports to fix the mode in which he shall execute that power, not as theretofore by his own independent action, but thereafter, only by the concurrence of the Senate. It is a regulation by the legislature of the manner in which an executive power is to be performed.

So, too, as to *ad interim* appointments; it does not purport to take away that power from the President; it only attempts to regulate the execution of the power in a special instance.

Mr. Burke, on the impeachment of Warren Hastings, speaking of the crimes for which he stood impeached, uses this significant language:

> They were crimes *not* against *forms*, but against those eternal laws of justice which are our rule and our birthright. His offences are *not* in *formal*, *technical* language, but in *reality*, in *substance*, and effect, high crimes and high misdemeanors.

Now, senators, if the legislative department had a constitutional right thus to regulate the performance of executive duties, and to change the mode and form of exercising an executive power which had been followed from the beginning of the government down to the present day, is a refusal of the Executive to follow a new rule, and, notwithstanding that, to adhere to the ancient ways, that sort of high crime and misdemeanor which the Constitution contemplates? Is it just ground for impeachment? Does the fact that such an act is called by the legislature a high crime and misdemeanor necessarily make it such a high crime and misdemeanor as is contemplated by the Constitution? If, for instance, the President should send a military order to the Secretary of War, is that an offence worthy of impeachment? If he should remove an officer on the 21st of February and nominate another on the 22d, would that be an impeachable misdemeanor? Now, it must be admitted that if the President had sent the name of Mr. Ewing to the Senate on the 21st, in the usual way, in place of Mr. Stanton, removed, and had not absolutely ejected Mr. Stanton from office, but had left him to await the action of the Senate upon the nomination, certainly in mere matter of form there would have been no violation of this tenure-of-office act.

Now, what did he do? He made an order for the removal of Mr. Stanton on the 21st, but did not eject him from office, and sent a nomination of Mr. Ewing to the Senate on the 22d. Is it possible that thereby he had committed an act that amounted to a high crime and misdemeanor, and deserved removal from office? And yet that is just what the President has done. He has more closely followed the mere matter of form prescribed by the tenure-of-office act than, according to the learned manager who opened this prosecution, was necessary. For, if he had made an order of removal, and at once had sent to the Senate his reasons for making such removal, and had stated to them that his purpose was to make this removal in order to test the constitutionality of the tenure-of-office act, then, says the honorable manager, "had the Senate received such a message, the representatives of the people might never have deemed it necessary to impeach the President for such an act, to insure the safety of the country, even if they had denied the accuracy of his legal positions." How, then, can it be deemed necessary to impeach the President for making an order

of removal on one day, advising the Senate of it the same day, and sending the nomination of a successor the next day? Was ever a matter more purely formal than this? And yet this is the only act. Is this, in the words of Mr. Burke, not in merely *technical* language, "but in reality, in substance, and effect," a high crime and misdemeanor within the meaning of the Constitution?

STANTON NOT WITHIN THE TENURE-OF-OFFICE ACT.

The first clause of the first section declares that every person then or thereafter holding any civil office under an appointment with the advice and consent of the Senate and due qualification, shall hold his office until a successor shall have been in like manner appointed and qualified.

If the act contained no other provisions qualifying this general clause, then it would be clear—

1. That it would apply to all civil officers who held by appointment made by the President with the advice of the Senate, including judicial officers as well as executive officers. It gives all of them the same right to hold, and subjects all of them to the same liability to be removed. From the exercise of the power of *suspension* by the independent act of the President, made applicable to any officer so holding, by the second section, judges of the United States are expressly excepted. We find no such exception as to the exercise of the power of *removal* declared in the first section. Judicial officers, as well as executive officers, are made to hold by the same tenure. They hold during the pleasure of the President and the Senate, and cease to hold when the President and Senate appoint a successor.

2. It applies equally to officers whose tenure of office, as fixed prior to the act, was to hold during the pleasure of the President, as to those who were to hold for a fixed term of years, or during good behavior.

3. It purports to take from the President the power to remove any officer, at any time, for any cause, by the exercise of his own power alone. But it leaves him a power of removal with the concurrence of the Senate. In this process of removal the separate action of the President and the Senate is required. The initiatory act must come from the President, and from him alone. It is upon his action *as taken* that the Senate proceeds, and they give or withhold their consent to what he *has* done. The manner in which the President may exercise his part of the process is merely formal. It may be simply by the nomination of a successor to the incumbent or the officer intended to be removed. Then, upon the confirmation by the Senate of such nomination, and the issuance of a commission to him, the removal becomes complete. Or the President may exercise his part of the process by issuing an order of removal followed by a nomination. Neither the order for removal nor the nomination works a change in itself. Both are necessarily conditional upon the subsequent action of the Senate. So, too, the order of removal, the nomination, and the confirmation of the Senate are not final. A further act remains to be done before the appointment of the successor is complete, and that is an executive act exclusively—the signing of the commission by the President. Up to this point the President has a *locus penitentiæ;* for, although the Senate have advised him to appoint his nominee, the President is not bound by their advice, but may defeat all the prior action by allowing the incumbent to remain in office.

Thus far we have considered the first clause of the first section of the act without reference to the context. Standing alone it seems to have a universal application to all civil officers, and to secure *all* of them who hold by the concurrent action of the President and the Senate against removal otherwise than by the same concurrent action, and to make all of them liable to removal by that concurrent action.

Digitized by Google

Are there exceptions to the universality of the tenure of office so declared? We say there are—

1. Exceptions by *necessary implication*. Judicial officers of the United States come within this exception, for their tenure of office is fixed by the Constitution itself. They cannot be removed either by the President alone or by the President and Senate conjointly. They alone hold for life or during good behavior, subject to only one mode of removal, and that is by impeachment.

2. Exceptions *made expressly* by the provisions of the act, which make it manifest that it was not intended for all civil officers of the United States. First of all, this purpose is indicated by the *title* of the act. It is entitled "An act regulating the tenure of *certain* civil offices"—not of *all* civil offices. Next, we find that immediately succeeding the first clause, which, as has been shown, is in terms of universal application, comprehending "every person holding any civil office," the purpose of restraining or limiting its generality is expressed in these words, "except as herein otherwise provided for." This puts us at once upon inquiry. It advises us that all persons and all officers are not intended to be embraced in the comprehensive terms used in the first clause; that some persons and some officers are intended to be excepted and to be "otherwise provided for;" that some who do hold by the concurrent action of the President and the Senate are not to be secured against removal by any other process than the same concurrent action.

What class of officers embraced by the general provisions of the first clause are made to come within the clause of exception? The *proviso* which immediately follows answers the question. It is in these words:

> *Provided*, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

We see that these seven heads of department are the only civil officers of the United States which are especially designated. We see a clear purpose to make some special provision as to them. Being civil officers holding by the concurrent appointment of the President and the Senate, they would have been embraced by the first general clause of the section, if there had been no exception and no *proviso*. The argument on the other side is, that, notwithstanding the declared purpose to make exceptions, these officers are not made exceptions; that notwithstanding there is a *proviso* as to them, in which express provision is specially made for *their* tenure of office, we must still look to the general clause to find their tenure of office. It is a settled rule of construction that every word of a statute is to be taken into account, and that a *proviso* must have effect as much as any other clause of the statute.

Upon looking into this *proviso* we find its purpose to be the fixing a tenure of office for these seven officers. And how is that tenure fixed? We find it thus declared: some of them are given a tenure of office, others are not. But as to the favored class, as to that class intended to be made safe and most secure, even *their* tenure is not so ample and permanent as the tenure given to all civil officers who, prior to the act, held by the same tenure as themselves. By the general clause all civil officers are embraced and protected from executive removal, including as well those who hold by no other tenure than "the pleasure of the President." This tenure, "during the pleasure of the President," was the tenure by which all these cabinet officers held prior to the passage of this law. Now, for the first time, this *proviso* fixed another and safer tenure for certain cabinet officers, not for all. It gave to some of them the right to hold during the term of one President and for one month of the term of the succeeding President; but it did not give that right to all of them. It was given only to a favored class, and the new tenure so given to the favored class was not so

favorable as that given to other civil officers who had theretofore held by precisely the same uncertain tenure, that is to say, "the pleasure of the President," for these other civil officers were not limited to the term of one President and one month afterwards, but their tenure was just as secure from "the pleasure of the President," after the expiration of one presidential term, and after the expiration of the first month of the succeeding presidential term, as it was before.

We see, then, that in fixing a new tenure of office for cabinet officers, the tenure given to one class of them, and that the most favored, was not as favorable as that given to other civil officers theretofore holding by the same tenure with themselves. This favored class were not to hold one moment after the expiration of the month of the second presidential term. At that punctual time the right of the President to select his cabinet would, even as to them, return to him. If they were to remain after that, it would be that it was his pleasure to keep them and to give them a new tenure by his choice in the regular mode of appointment.

But, as we have seen, the *proviso* makes a distinction between cabinet officers and divides them into two classes, those holding by appointment of the President for the time being, and those not appointed by him, but by his predecessor, and holding only by his sufferance or pleasure. If ever an intent was manifest in a statute it is clear in this instance. There is a division into two classes, a tenure of office given to one class and withheld from the other. Before the passage of this act all cabinet officers holding under any President, whether appointed by him or his predecessor, held by the same tenure, "the pleasure of the President." This *proviso* makes a distinction between them never made before. It gives one class a new and more secure tenure, and it leaves the other class without such new tenure. One class was intended to be protected, the other not.

Now comes the question. Upon what ground was this distinction made? Why was it that a better title, a stronger tenure was given to one class than to the other? The answer is given by the proviso itself. The officers in the cabinet of a President, who were nominated by him, who were appointed by him with the concurrence of the Senate, are those to whom this new and better tenure is given. They are officers of his own selection; they are his chosen agents. He has once recommended them to the Senate as fit persons for the public trust, and they have obtained their office through his selection and choice. The theory here is, that having had one free opportunity of choice, having once exercised his right of selection, he shall be bound by it. He shall not dismiss his own selected agent upon his own pleasure or caprice. He is, in legal language, "estopped" by the selection he has made, and is made incapable by his own act of dissolving the official relation which he has imposed on himself. Having selected his cabinet officer, he must take him as a man takes his chosen wife, for better or worse.

But as to such cabinet officers as are not of a President's selection; as to those who have been selected by a former President; as to those whose title was given by another; as to those he never appointed, and, perhaps, never would have appointed; as to those who came to him by succession and not by his own act; as to those who hold merely by his acquiescence or sufferance—*they* are entitled to no favor, and receive none. They stand as step-children in his political family, and are not placed on the same level with the rightful heirs entitled to the inheritance.

The construction claimed by the managers leads to this inevitable absurdity: that the class entitled to favor are cut off at the end of the month, while those having a less meritorious title remain indefinitely. What was intended for a benefit becomes a mischief, and the favored class are worse off than if no favor had been shown them. Their condition was intended to be made better than

Digitized by Google

that of their fellows, and has been made worse. From those entitled to protection, it is taken away to be given to those not entitled.

Now, when President Johnson was invested with his office, he found Mr. Stanton holding the office of Secretary of War. He had been appointed by Mr. Lincoln during his first term, and was holding in the second month of Mr. Lincoln's second term under the old appointment. Mr. Stanton was neither appointed by Mr. Lincoln nor Mr. Johnson for that second term; so that we are relieved from all question whether the fractional term, counting from the accession of Mr. Johnson, is to be called the unexpired term of Mr. Lincoln, or the proper term of Mr. Johnson, and whether, if he had been appointed or reappointed by Mr. Lincoln during his second term, he might not have claimed that he was entitled, as against Mr. Johnson, to hold on to its end. Mr. Stanton never had any tenure of office under the tenure-of-office act for the current presidential term, never having been appointed for that term by either Mr. Lincoln or Mr. Johnson. He, therefore, does not come within the category of those members of Mr. Johnson's cabinet who have been appointed by Mr. Johnson.

At the date of the passage of the tenure-of-office act, the cabinet of Mr. Johnson was composed as follows: the Secretaries of State, of the Treasury, of War, and of the Navy, held by appointment of Mr. Lincoln made in his first term; the Secretary of the Interior, the Postmaster General, and the Attorney General, held by the appointment of Mr. Johnson made during his current term. There was, then, as to the entire seven, a difference as to the manner and time of their appointment. Four had been appointed by Mr. Lincoln, and the other three by Mr. Johnson. All of them held by the same tenure, "the pleasure of the President." All of them, without reference to constitutional provisions, were, by existing laws, removable by the independent action of the President. The acts of Congress creating the offices of Secretaries of State, of War, and of the Navy, expressly recognize the executive authority to remove them at pleasure. The acts of Congress creating the four other heads of departments place them on the same footing as to tenure of office. All these acts remained, in this particular, in full force. This tenure-of-office act introduces a distinction made applicable to cabinet officers alone, never made before. For the first time it gives to those appointed by the President for the time being a new tenure. It secures them from removal at his pleasure alone. It repeals, as to them, the existing laws, and declares that they shall thereafter be entitled to hold during the remainder of the term of the President by whom they were appointed, and for one month of the succeeding presidential term, exempt from removal by the sole act of the President, and only subject to removal by the concurrent act of the President and Senate.

But it gives them no right to hold against the pleasure of the succeeding President one moment after the expiration of that punctual time of one month. When that time has arrived their right to hold ceases and their offices become vacant. The policy here declared is unmistakable, that notwithstanding anything to the contrary in the act, every President shall have the privilege of his own choice, of his own selection of the members of his cabinet. The right of selection for himself is, however qualified. He may not, as theretofore, enjoy this right throughout his term. For the first month he must take the cabinet of his predecessor, however opposed to him in opinion or obnoxious to him personally. Then, too, while the right is given to him, it can be exercised but once. It is a power that does not survive, but expires with a single execution.

Now, as to the three members of Mr. Johnson's cabinet, appointed by his own exercise of this independent power, he having, as to them, once exercised the power, it is, as to them, exhausted. The consequence is that these three officers no longer remain subject to *his pleasure* alone. They are entitled to

Digitized by Google

hold in defiance of his wishes throughout the remainder of his term, because they are his own selected officers; but they are not entitled to hold during the whole term of his successor, but only for a modicum of that term, just because they were not selected by that successor. So much for these three.

Now, as to the other four, as to whom Mr. Johnson has not exercised his right of choice even by one appointment. May they hold during the residue of his term in defiance of his wishes? Do they come within that clear policy of giving to every President one opportunity at least to exercise his independent right of choice? Surely not. Then, if, as to them, he has the right, how can he exercise it, if, as in the case of Mr. Stanton, the cabinet officer holds on after he has been requested to resign? What mode is left to the President to avail himself of his own independent right when such an officer refuses to resign? None other than the process of removal; for he cannot put the man of his choice *in* until he has put the other *out*. So that the independent right of choice cannot under such conditions be exercised at all without the corresponding right of removal; and the one necessarily implies the other.

We have seen that the tenure of office fixed by the *proviso* for cabinet officers applies only to those members of Mr. Johnson's cabinet appointed by himself. It therefore does not apply to Mr. Stanton. If there is any other clause of the act which applies to Mr. Stanton, it must be the first general clause; and if that does not apply to him, then his case does not come within the purview of the act at all, but must be ruled by the pre-existing laws, which made him subject at all times to the pleasure of the President and to the exercise of his independent power of removal. And this is precisely what is claimed by the managers. They maintain that, although the *proviso* does not give Mr. Stanton a new tenure, yet the first general clause does, and that he is put by that clause on the same footing of all other civil officers who, at the date of the act, held by the concurrent appointment of the President and Senate by no other tenure than "during the pleasure of the President."

But all the officers intended to be embraced by that first clause, who held by that tenure before, are declared to hold by a new tenure. Not one of them can be removed by the President alone. Whether appointed by the President for the time being or by his predecessor, they must remain in defiance of the President until removed by the concurrent action of the President and the Senate. In effect, so far as the power of the President is concerned, *they* may hold for life. If Mr. Stanton comes within the protection of that clause, if his tenure of office is fixed by that clause, it follows inevitably that Mr. Johnson cannot remove him. It follows as inevitably that no succeeding President can remove him. He may defy Mr. Johnson's successor as he now defies Mr. Johnson. He may say to that successor as he has said to Mr. Johnson, "I am compelled to deny your right under the Constitution and laws of the United States, without the advice and consent of the Senate." If the successor of Mr. Johnson should point him to the *proviso*, and at the end of the month require him to leave, his answer, according to the managers, would run thus: "That *proviso* did not fix my tenure of office. It did not apply to me, but only to those appointed by Mr. Johnson. They must go out with the month; I do not. My tenure is fixed by the first clause, and you cannot get clear of me without the advice and consent of the Senate."

NO REMOVAL OF MR. STANTON.

But if it be held that Mr. Stanton did come within the purview of the tenure-of-office act; if it be held that his removal by the independent action of the President is forbidden by the act, then we maintain that no such removal is charged in the articles or made out in the proof.

It is only in the first article that any charge is made in reference to Mr. Stan-

ton's removal. That article nowhere alleges that Mr. Stanton has been removed, either in law or in fact. It does allege that on the 21st of February Stanton was "lawfully entitled to hold said office of Secretary for the Department of War," and that on that day the President "did, unlawfully and in violation of the Constitution and laws of the United States, issue an order in writing for the removal of Edwin M. Stanton from the office of Secretary for the Department of War." It is the issuance of this order *for a removal* that is made the *gravamen* of the charge. It is not followed by any allegation that it had the effect to work a removal, either in law or in fact. On the contrary, in the very next article, which is founded on the order to Thomas, which purports to be made after the order for the removal of Stanton, it is alleged that Stanton still held the office lawfully, and that notwithstanding the order for the removal to Stanton and the order to Thomas to act as Secretary, Stanton still held the office, and no vacancy was created or existed. This is the tenor of every article, that Stanton never has been removed, in law or in fact; that there never has been an *ouster*, either in law or in fact; that there never has been at any time a vacancy. The proof shows that Stanton remains in possession, and that his official acts continue to be recognized.

Now, if the order *per se* operated a removal in law, it must follow that the order was valid and in conformity with the Constitution and laws of the United States, for no order made contrary thereto could take effect in law. If there was a removal *in law* the executive order which accomplished it was a valid, not an unlawful act. But if the order did not operate a removal *per se*, and if a removal *in fact*, though not *in law*, might be held sufficient to constitute an offence, and if it were alleged and were proved that under the illegal order an actual *ouster* or removal was effected by force or threats, the answer to be given in this case is conclusive. No *ouster* in fact, no actual or physical removal, is proved or so much as charged. Mr. Stanton has never to this day been put out of actual possession. He remains in possession as fully since the order was made as before, and still holds on.

Now we look in vain through this tenure-of-office act for any provision forbidding *an attempt* to cause a removal, or making it penal to issue an order for such a purpose. The sixth section is the only one on the subject of removal, and that provides: "That every removal" "made" "contrary to the provisions of this act" "shall be deemed, and is hereby declared to be, a high misdemeanor;" and is made punishable by fine not exceeding $10,000, or by imprisonment not exceeding five years, or both, at the discretion of the court.

No latitude of construction can torture an attempt to make a removal into an actual removal, or can turn an abortive effort to do a given thing into the accomplished fact. Such a latitude of construction could not be allowed where the rule of construction is least restricted, and least of all in a penal statute where the rule of construction is the most restricted.

It seems a waste of words to argue this point further. There is a total failure of the case upon the first article on this point, if we had none other. And yet this article is the head and front of the entire case. Strike it out, and all that remains is "leather and prunella."

But, senators, if you should be of opinion that the tenure-of-office act protected Mr. Stanton, and that the attempt to remove him was equivalent to a removal, we next maintain—

First. That the President had a right to construe the law for himself; and if, in the exercise of that right, he committed an error of construction, and acted under that error, he is not to be held responsible.

Second. If he had so construed the law as to be of opinion that Mr. Stanton was intended to be protected by it against his power of removal, and was also of opinion that the law in that respect was contrary to the Constitution, he is not to be held responsible if he therein committed an error.

Digitized by Google

I proceed to argue these points in the order in which they have been stated. First, then, is the President responsible for an official act done by him under an erroneous construction of an act of Congress? I agree that ignorance or misconception of the law does not, in general, excuse a party from civil or criminal liability for an act contrary to law. But this well-established rule has exceptions equally well established, and the case here falls within one of the exceptions, and not within the rule. Where a law is passed which concerns the President, and touches his official duties, it is not only his right, but his duty, to determine for himself what is the true construction of the law, and to act, or refuse to act, according to that determination, whatever it may be. He is an executive officer, not a mere ministerial officer. He is invested with a discretion, with the right to form a judgment, and to act under his judgment so formed, however erroneous. No such discretion is allowed to a ministerial officer. *His* business is not to construe the law, but merely to perform it, and he acts at his peril if he does not do that which is commanded by reason of an erroneous construction, however honestly entertained.

But, as I have said, the President is not a ministerial officer. His function is not merely to execute laws, but to construe them as well. The Constitution makes this too clear for question. It does not, it is true, vest him with judicial power, which always implies the exercise of discretion. It vests him with the executive power, but, nevertheless, with a discretion as to the mode of its execution. The Constitution contemplates that, in the exercise of that executive power, he may be involved in doubt and perplexity as to the manner of its exercise, and, therefore, gives him the privilege of resorting to his cabinet officers for advice. The Constitution binds him by an oath not only faithfully to execute his office, not merely to carry into execution laws of Congress, but also, to the best of his ability, to preserve, protect, and defend the Constitution itself. This great trust implies the exercise of a large discretion.

It is sufficient upon this point to cite a late opinion of the Supreme Court of the United States in what is called the Mississippi injunction case, decided in April, 1867. Mr. Chief Justice Chase, delivering the opinion of the court, says:

> It is assumed by the counsel for the State of Mississippi that the President, in the execution of the reconstruction acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import. A ministerial duty, the performance of which may, in proper cases, be required of a head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, or imposed by law.

After citing some cases of merely ministerial duty, the Chief Justice proceeds as follows:

> In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single, specific act, and that performance, it was held, might be required by *mandamus*. Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among those laws the acts named in the bill. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political. An attempt on the part of the judicial department of the government to enjoin the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as an "absurd and excessive extravagance." It is true that, in the instance before us, the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principle which forbids judicial interference with the exercise of executive discretion.

When, therefore, this tenure-of-office act came to be considered by the President in reference to his purpose to remove Mr. Stanton from office, he had a right and it was his duty to decide for himself whether the proposed removal of Mr. Stanton was or was not forbidden by the act. As yet that act had received no construction by the judicial department, nor had the President any

authority to send the act to the Supreme Court, and require the judgment of that court upon its true meaning. The Constitution gave him no right to resort to the judges for advice. He could not settle his doubts, if he entertained doubts, by asking any other opinions than those of the heads of departments.

But the President was not even required to ask the advice of his cabinet, nor even of his Attorney General, to which officer he may resort for advice as a head of department under the provisions of the Constitution, and whose special duty it is made by an act of Congress to give the President advice when called for by him on any question of law. The President, although such aids are given to him by the Constitution in forming his judgment on a question of law, is not bound to resort to them. He may do so out of abundant caution, but such is his own latitude of discretion that he may act without invoking such aid, or he may reject the advice when asked for and given, and lawfully decide for himself, though perhaps not so wisely or cautiously.

Besides this late authoritative exposition, as to the discretionary power of the President, there is abundance of other authority entitled to the gravest consideration, which might be adduced to the same effect, and which I propose to introduce upon the next point, which I now proceed to consider, and that point is, that if the President had so construed this tenure-of-office act as to be satisfied that Mr. Stanton came within its provisions, but was also of opinion that the law in that respect was contrary to the Constitution, he is not to be held responsible if therein he committed an error. The case in that aspect stood thus: here was an act of Congress which, in the construction given to it by the President, forbade the removal of Mr. Stanton from the War Department. The President, in the exercise of his executive functions and of his duty to see that the laws were faithfully executed, came to the conclusion that in the execution of so much of this executive duty as had relation to the administration of the War Department, it was expedient to place it in the hands of another person. His relations with Mr. Stanton were such that he felt unwilling any longer to be responsible for his acts in the administration of that department, or to trust him as one of his confidential advisers. The question at once arose whether this right of removal, denied to him by this law, was given to him by the Constitution; or, to state it in other words, whether this law was in this respect in pursuance of the Constitution.

Now, it appears that his opinion upon this question had been made up deliberately. When this same law was on its passage and had been presented to him for his approval, his opinion was formed that it was in violation of the Constitution. He refused to approve it, and returned it to Congress with a message in which this opinion was distinctly announced. It passed, notwithstanding, by a constitutional majority in both houses. No one doubts that then, at least, he had a perfect right to exercise a discretion, and no one has ever yet asserted that an error in an opinion so formed involved him in any liability.

The exercise of that veto power exhausted all his means of resistance to what he deemed an unconstitutional act, in his legislative capacity; and so far as the law provided a rule of action for others than himself, no other means of resistance were left to him. But this law was directly aimed at him and the exercise of the executive power vested in him by the Constitution. When, therefore, he came a second time to consider it, it was in the discharge of an executive duty. Had he then no discretion of any sort? Was he bound to act in a merely ministerial capacity? Having once finally exercised a discretion in his legislative capacity to prevent the passage of the law, was he thereby deprived of his discretion in his executive capacity when he was called upon to act under it?

It has been said that a law passed over a President's veto by a majority of two-thirds, has a greater sanction than a law passed in the ordinary way by a mere majority. I know that there are those who, while they admit that, as to a law passed in the ordinary mode by the concurrent acts of the two houses and

the President, it may be questioned on the score of unconstitutionality, yet maintain that a law not passed by such a concurrence, but by the separate action of the two houses without the concurrence of the executive, or against his will, is something superior to ordinary legislation, and takes the character of a fundamental or organic enactment. But this is a modern heresy unsustained by the slightest reason or authority. It is at last but a legislative act. It stands upon an equal footing with other legislative acts. It cannot be put upon higher ground or lower ground. No distinction is allowable between the one and the other. But, if it were, it certainly would seem more reasonable that such a law, passed by one co-ordinate department, would stand on lower ground than a law passed with full concurrence of both departments.

The question then recurs, is the President invested with a discretion in his executive capacity? In the exercise of that discretion may he compare the law with the Constitution, and if, in his opinion, the law vests him with a power not granted by the Constitution, or deprives him of a power which the Constitution does grant, may he refuse to execute the power so given, or proceed to execute the power so taken away? We have already cited a late decision of the Supreme Court directly in point. That presented the direct question whether as to the reconstruction acts passed like this tenure-of-office act by a vote of two-thirds in each house, the President had, notwithstanding, in reference to those laws, an executive discretion. The decision maintains that he had.

I now proceed to show that this is no modern doctrine. The authorities which I shall cite go beyond the necessities of this case. Some of them go to the length of asserting that this executive discretion survives even after the passage of the law by the legislative department it has been construed by the judicial department, and in that extreme case leave the President at last to act for himself in opposition to both the other departments. I will first cite some opinions upon this extreme position.

Mr. Jefferson says:

The second question, whether the judges are invested with exclusive authority to decide on the constitutionality of a law, has been heretofore a subject of consideration with me in the exercise of official duties. Certainly there is not a word in the Constitution which has given that power to them more than to the executive or legislative branches. Questions of property, of character, and of crime, being ascribed to the judges, through a definite course of legal proceedings—laws involving such questions belong of course to them, and as they decide on them ultimately and without appeal, they of course decide *for themselves*. The constitutional validity of the law or laws prescribing executive action, and to be administered by that branch ultimately and without appeal, the executive must decide for *themselves* also whether under the Constitution they are valid or not. So, also, as to laws governing the proceedings of the legislature; that body must judge *for itself* the constitutionality of the law, and, equally, without appeal or control from its co-ordinate branches. And, in general, that branch which is to act ultimately and without appeal, on any law, is the rightful expositor of the validity of the law, uncontrolled by the opinions of the other co-ordinate authorities.

President Jackson, in his veto message upon the bank bill, uses this language:

If the opinion of the Supreme Court covered the whole ground of this act it ought not to control the co-ordinate authorities of this government. The Congress, the Executive, and the court must each for itself be guided by its own opinion of the Constitution.

Mr. Van Buren makes use of this language:

Everybody knows that an act which is contrary to the Constitution is a nullity, although it may have passed according to the forms of the Constitution. That instrument creates several departments, whose duty it may become to act upon such a bill in the performance of their respective functions. The theory of the Constitution is that these departments are co-ordinate and independent of each other, and that, when they act in their appropriate spheres, they each have a right, and it is the duty of each to judge for themselves in respect to the authority and requirements of the Constitution without being controlled or interfered with by their co-departments, and are each responsible to the people alone for the manner in which they discharge their respective duties in that regard. It is not, therefore, to be presumed that that instrument, after making it the President's especial duty to take an oath to protect and uphold the Constitution and prevent its violation, intended to deny to him the right to withhold his assent from a measure which he might conscientiously believe

Digitized by Google

would have that effect and to impose upon him the necessity of outraging his conscience by making himself a party to such a violation.

Whether these views are sound or not is not now the question. It happens that as to this tenure-of-civil-office law, it has never been held by the Supreme Court to be constitutional. But, if it had been otherwise, if this law had been pronounced constitutional by a solemn decision of the Supreme Court of the United States, what ground would there be for holding the President guilty of a high misdemeanor in forming an opinion sanctioned by the authority of three of his predecessors?

I will now call attention to certain leading authorities upon the point that a law passed by Congress in violation of the Constitution is totally void, and as to the discretion vested in the President to decide for himself the question of the validity of such a law. I cite first from the Federalist, No. 76:

There is no position which depends on clearer principles than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon *the other departments*, it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution.

I cite next from No. 31 of the Federalist, in reference to that clause of the Constitution declaring its supremacy and the supremacy of the laws. It is said:

It will not, I presume, have escaped observation that it *expressly* confines this supremacy to laws made *pursuant to the Constitution*, which I mention merely as an instance of caution in the convention; since that limitation would have been to be understood, though it had not been expressed.

Chancellor Kent, in the first volume of his Commentaries, uses this language:

But in this and all other countries where there is a written constitution designating the powers and duties of the legislative as well as of the *other* departments of the government, an act of the legislature may be void as being against the Constitution.

Speaking of the legislative power, the Chancellor adds:

It is liable to be constantly swayed by popular prejudice and passion, and it is difficult to keep it from pressing with injurious weight upon the constitutional rights and privileges of *the other departments*.

In Hayburn's case (2 Dall., page 407) the opinions of the judges of the circuit courts of the United States for the districts of New York, Pennsylvania, and North Carolina, upon the constitutionality of the act of March 23, 1792, are reported. This act purported to confer upon the judges a power which was not judicial. They were of opinion that Congress had no authority to invest them with any power except such as was strictly judicial, and they were not bound to execute the law in their judicial capacity.

In Calder *vs.* Bull, (3 Dall., page 398,) speaking of the paramount authority of Federal and State constitutions, it is said:

If any act of Congress or of the legislature of a State violates those constitutional provisions, it is unquestionably void.

In Van Horn's Lessee *vs.* Dorrance, (2 Dall., page 308,) we find the following:

What are legislatures? Creatures of the Constitution; they owe their existence to the Constitution. They derive their powers from the Constitution. It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. Whatever may be the case in other countries, yet in this there can be no doubt that every act of the legislature repugnant to the Constitution is absolutely void.

Chief Justice Marshall, delivering the opinion of the court in Marbury *vs.* Madison, says:

It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or, that the legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is

Digitized by Google

not law; if the latter part be true, then written constitutions are absurd attempts on the part or the people to limit a power in its nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution is void. Thus the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as *other departments*, are bound by that instrument.

In Dodge *vs.* Woolsey, (18 Howard, pages 347-8,) the court say:

The departments of the government are legislative, executive and judicial. They are co-ordinate in degree to the extent of the powers delegated to each of them. Each, in the exercise of its powers, is independent of the other, but all, rightfully done by either, is binding upon the others. The Constitution is supreme over all of them, because the people who ratified it have made it so; consequently anything which may be done unauthorized by it is unlawful.

Again, in 22 Howard, page 242, the nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.

I will now refer to some decisions of the Supreme Court of the United States, which relate more particularly to the point, that as an executive officer the President is vested with a discretion.

In Marbury *vs.* Madison (1 Cranch, page 380) is the following:

By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties he is authorized to appoint certain officers to act by his authority and in conformity with his orders. In such cases their acts are his acts, and in whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and exist, no power to control this discretion.

And in Martin *vs.* Mott (12 Wheaton, page 31,) this:

The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and, in effect, defeat it. Whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.

Quotations from opinions of the Supreme Court maintaining that the executive power of the President is in no sense merely *ministerial* but strictly *discretionary*, might be multiplied indefinitely. And, indeed, it is easy to show, from repeated decisions of the same court, that the heads of departments, except where the performance of a specific act or duty is required of them by law, are in no sense ministerial officers, but that they too are clothed with a discretion, and protected from responsibility for error in the exercise of that discretion. Thus, Decatur *vs.* Paulding, 14 Peters; Kendall *vs.* Stokes, 3 Howard; Brashear *vs.* Mason, 6 Howard; in which latter case the court says:

The duty required of the Secretary by the resolution was to be performed by him as the head of one of the executive departments of the government, in the ordinary discharge of his official duties; that in general such duties, whether imposed by act of Congress or by resolution, are not merely ministerial duties; that the head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion; and that the court could not, by *mandamus*, act directly upon the officer, to guide and control his judgment and discretion in matters committed to his care in the ordinary discharge of his official duties.

I will now ask your attention, senators, to the remaining articles.

And first the four conspiracy articles. These allege that the President unlawfully conspired with Lorenzo Thomas, and others to the House of Representatives unknown, on the 21st of February, 1868—first, to hinder and prevent Edwin M. Stanton, Secretary of War, from holding the office of Secretary for the Department of War, contrary to the conspiracy act of July 31, 1861, and in violation of the Constitution of the United States; second, to prevent and hinder the execution of the "act regulating the tenure of certain civil offices,"

Digitized by Google

and in pursuance of this conspiracy did unlawfully attempt to prevent Edwin M. Stanton from holding the said office; third, by force to seize, take, and possess the property of the United States in the Department of War, in the custody and charge of Edwin M. Stanton, Secretary thereof, contrary to the conspiracy act of July 31, 1861, and of the tenure-of-office act; fourth, with intent unlawfully to seize, take, and possess the property of the United States in the Department of War, in the custody of Edwin M. Stanton, the Secretary thereof, with intent to violate the "act regulating the tenure of certain civil offices."

It will be seen that these four conspiracy counts all relate to the same subject-matter, the War Office, the Secretary of the War Office, and the public property therein situated. And this is all that is necessary to be said about these articles; for not a scintilla of proof has been adduced in their support. The case attempted to be made out under these conspiracy articles by the managers was, in the first place, by the production of the two sets of orders issued on the 21st of February. But as these of themselves did not amount to evidence of a conspiracy, as they carried the idea of no unlawful agreement, but simply stood upon the footing of an order given by a President to a subordinate, the managers, in order to make some show of a case, offered to introduce the declarations of General Thomas, made on the night of the 21st and on the 22d of February and other days, intending to show a purpose on his part to obtain possession of the department and the property of the department by intimidation and force. Objection was made at the time to the introduction of these declarations without laying a foundation upon which the President could be made liable by such declaration. Impressed with this objection, the manager who opened the prosecution, after some consideration, at length answered an inquiry of a senator, that he expected to follow up the proof of the declarations by proof connecting the President with them. Upon that assurance he was allowed to give the declarations of General Thomas in evidence. But that is the last we have heard of any supporting proof so promised. Not a scintilla of proof has been obtained from General Thomas or from any other quarter, under the conspiracy charge, of any authority given or intended to be given by the President to General Thomas to resort to force, intimidation, or threats in the execution of the order which the President had given. This is quite enough to say with regard to those articles.

Next, as to the ninth article, usually known as the *Emory* article. It had no substance in itself from the beginning, and, since the testimony of Mr. Welles, remains without the slightest foundation.

Next, as to the tenth article, relative to the speeches made at the Executive Mansion, at Cleveland, and at St. Louis, in the months of August and September, 1866. It is in the name of all the people of the United States that you, senators, are, in this article, called upon to hold the President of the United States criminally responsible, even to the loss of his office, for speaking, as the article has it, with a loud voice to assemblages of American citizens, what is called scandalous matter touching the thirty-ninth Congress of the United States.

In the first place, that political body did not deem it necessary to guard their own honor and privileges by taking notice of charges so made against themselves. Every word charged had been brought to their notice, and they were pressed again and again to commence proceedings to vindicate their honor thus aspersed. But they deliberately declined to interfere, and so the slander, if it were a slander, spoken, and the object against which it was spoken, have all passed away, and a new Congress finds it necessary to vindicate the honor of its defunct predecessor by doing that which its predecessor refused to do for itself.

When the statutes of *scandalum magnatum* prevailed and were in full force in England, there happened this case, which will be found reported in Yelver-

ton: a common citizen was prosecuted for scandalous matter spoken of a peer. Pending the prosecution the great man lost his peerage; whereupon it was decided that the prosecution should be dismissed.

It passes comprehension that such an article as this tenth article should be gravely presented in the name of the American people for words spoken to them by one of their servants, the President, against another of their servants, the Congress of the United States. If there is any one precious right which our people value as a jewel beyond price, it is the right of free speech with the corresponding right of a free press. Muzzle the one or gag the other, and we are back again to the times when there was no such body in the state as the people.

This tenth article carries us back five hundred years, to the days when the privilege of Parliament meant the privilege of the House of Lords, and no common man dare speak against its authority, or the authority or personal character of the great men of the realm who sat there. A common man said of that proud prelate, the Bishop of Norwich, "You have writ me that which is against the word of God, and the maintenance of superstition." Straightway the privilege of Parliament seized him and punished him. Another said of my Lord Abergavenny, "He sent for me and put me in little ease.' That poor man was seized at once and punished for daring to speak thus of one of the magnates of the land.

But the spirit of English liberty, after struggling for years, at last proved victorious over these ancient abuses, and a man in England may now speak his religious sentiments without fear of the fires of Smithfield; he may discuss the proceedings of the great men of Parliament with at least a fair opportunity of defending the liberty of speech. And at last the press of that country has cleared itself of nearly all the shackles that have been imposed upon it. Nominally the law remains unchanged. Privilege of Parliament has not been repealed; but, like the sword of the Black Prince in Westminster Abbey, "it lies more honorable in its rust than in its edge; more glorious in its disuse than in its service."

Upon the formation of the Constitution of the United States our fathers were not unmindful of what had happened in the past. They had brought with them the traditions of suffering and persecution for opinion's sake, and they determined to lay here for themselves the foundations of civil liberty so strong that they never could be changed. When our Constitution was formed and was presented to the various States for adoption, the universal objection made to it was not so much for what it contained as for what it omitted. It was said, we find here no bill of rights; we find here no guarantee of conscience, of speech, of press. The answer was, that the Constitution itself was, from beginning to end, a bill of rights; that it conferred upon the government only certain specified and delegated powers, and among these were not to be found any grant of any power over the conscience or over free speech or a free press. The answer was plausible, but not satisfactory.

The consequence was that at the first Congress held under the Constitution, according to instructions sent from the various State conventions, ten amendments were introduced and adopted, and the first in order among them is this amendment:

ARTICLE 1. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peacefully to assemble and to petition the government for a redress of grievances.

There, in that article, associated with religious freedom, with the freedom of the press, with the great right of popular assemblage and of petition—there we find safely anchored forever this inestimable right of free speech.

Mark now, senators, the prescient wisdom of the people! Within ten years after the adoption of the Constitution the government was entirely in the hands

Digitized by Google

of one party. All of its departments, executive, legislative, and judicial, were concentrated in what was then called the *Federal* party. But a formidable party had begun to show itself, headed by a formidable leader—a party then called the *Republican*, since known as the *Democratic* party. Nothing was left to them but free speech and a free press. All the patronage was upon the other side. But they made the most of these great engines. So much, however, had the dominant party lost discretion, confident in its party strength, that, irritated to folly and madness by the fierce attacks made upon its executive, its judiciary, and its houses of Congress, in an evil hour it passed an act, July 14, 1798, entitled "An act for the punishment of certain crimes against the United States."

The second section of this act provides:

That if any person shall write, print, utter, publish * * * * any false, scandalous, and malicious writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government or either house of the said Congress, or the said President, or to bring them or either of them into contempt or disrepute, or to excite against them, or either or any of them, the hatred of the good people of the United States * * * such persons * * * * shall be punished by a fine not exceeding $2,000 and by imprisonment not exceeding two years.

No act has ever been passed by the Congress of the United States so odious to the people as this. Mr. Hamilton and other great federalists of the day attempted in vain to defend it before the people. But the authors of the law and the law itself went down together before the popular indignation, and this act, which was gotten up by a great and powerful party in order to preserve itself in power, became the fatal means of driving that party out of power, followed by the maledictions of the people.

History continues to teach, now as heretofore, that "eternal vigilance is the price of liberty." There is now, as there has been in the past, a constant tendency to transfer power from the many to the few. There the danger lies to the permanence of our political institutions, and its source is in the legislative department, and in the legislative department alone. Guard that well and we are safe; and to guard it well you must guard the other departments from its encroachments. Without the help of the people they cannot defend themselves. The last attempt manifested in this tenth article to again bring into play the fearful privilege of the legislative department is only a repetition of what has happened from the dawn of history. Wherever that has been the governing element it has always been jealous of free speech and a free press. It has not been so with the absolute monarch. He feels secure, surrounded by physical power, sustained by armies and navies. Accordingly we find that such a monster as Tiberius pardoned a poor wretch who had lampooned his authority and ridiculed his conduct, while the decemvirs remorselessly put to death a Roman satirist who was bold enough to attack and to bring into contempt their authority.

The eleventh article is the only one that remains to be considered. I confess my inability to make anything out of that article. There is, in the first place, a reference to the speech of the 18th of August, 1866, and it then charges substantially the same things contained in the tenth article in reference to that speech, adding a new allegation, not sustained by proof of the speech itself or by any other proof in the case, that by that speech the President denied the power of the thirty-ninth Congress to propose amendments to the Constitution of the United States. Then follow indefinite allegations of contriving means or attempting to contrive means to defeat the execution of the tenure-of-civil-office act, the military appropriation act, and the reconstruction act. What things were contrived we are not told, nor what things were attempted to be contrived. I do not feel warranted in taking up the time of the Senate by any further consideration of this anomolous article. So far as it has any reference whatever to the freedom of speech, what I have said in answer to the tenth

Digitized by Google

article seems to be sufficient. As to anything this article contains beyond reference to that speech, I, for one, can make nothing out of it.

And now, senators, after this review of the articles of impeachment, we are prepared to form some idea of the nature of this impeachment itself. Where, now, is the mischief; where now is the injury to any individual or to any officer of the government brought about by the action of the President? Whether actuated by good motives or bad, no injury has followed; no public interest has suffered; no officer has been changed, either rightfully or wrongfully; not an item of public property or of public money has passed out of the custody of law, or has been appropriated to improper uses.

To all this it is said that it is enough that the law has been violated; that powers have been assumed by the President not conferred upon him by the Constitution of the United States. It is in the order of the 21st of February, 1868, that it is claimed on the part of the managers that the President usurped a power not granted by the Constitution.

If that proposition could be established the managers would still be a great way off from a conviction for an impeachable offence. Much more must be made out besides the actual violation by the President of the constitutional provision: first of all, the criminal intent to violate; and secondly, the existence of an act of Congress providing that such violation with criminal intent should amount to a high crime and misdemeanor. But I hasten to meet the managers upon the main proposition, and I maintain with confidence that the order issued on the 21st of February, 1868, for the removal of Mr. Stanton, was issued by the President in the exercise of an undoubted power vested in him by the Constitution of the United States. No executive order issued by any President, from the time of Washington down to the present, comes to us with a greater sanction or higher authority or stronger indorsement than this order. If this order is indeed, as it is claimed, a usurpation of power not granted by the Constitution, then Washington was a usurper in every month of his administration, and after him every President that ever occupied that high office from his day to that of the present incumbent; for every one of them has exercised, without doubt and without question, this executive power of removal from office.

So far as this question stands upon authority, it may be said to have been more thoroughly and satisfactorily settled than any one that has at any time agitated the country; settled first in 1789, by the very men who framed the Constitution itself; then, after the lapse and acquiesence of some forty years, brought again and again into question in high party times in 1826, in 1830, and in 1835. But in the worst party times it was never changed by the legislature, but left as it was until the 2d of March, 1867, when, after the lapse of almost *eighty* years, a new rule was attempted to be established which proposes to reverse the whole past.

Now, senators, let us consider upon the Constitution itself this question of the executive power of removal. No power is expressly given by the Constitution to *remove* any civil officer from office, except what is given by impeachment. The power of *appointment* to office, however, is expressly given, and that is given to the President, as to certain officers, by and with the advice and consent of the Senate. That is, in the act of appointing to office the main part is done by the Executive, but there must be a participation therein of the legislative department.

Now, all agree that there must exist somewhere a power to remove officers for other causes and under other circumstances than those which would justify or require impeachment. Somewhere in the executive department, or in the executive and legislative departments combined, there must be lodged this power of removal. Inasmuch as it is not given expressly to the President, does it belong to both; and if not to both, to which of the two does it properly belong?

First of all, then, let us consider the thing that is to be done. It is a con-

Digitized by Google

tingency that arises, not in the legislative department, but in the executive department. It concerns an officer of that department charged with the execution of the law. He is in the performance of a strictly executive duty. It is found necessary to displace him. Is it in the nature of things, there being an executive power and a legislative power, that there can be a doubt that it is the executive power that must now be called into action?

Consider how carefully these powers are separated in the Constitution, and their functions defined. The legislative power is vested in the legislature. What is legislative power? It is a power to make laws—a power to legislate; not a power to carry laws into execution after they are made; not a power to give interpretation to laws after they are made. Its function begins and ends in the creation of law itself. Undoubtedly the legislative power has much to do in the matter of offices and of the executive department. It is a part of the legislative function to create these offices, to abolish them, to define the duties of the incumbents, to amend them, and from time to time change them, and to fix the salaries of the officers—all these are properly legislative functions having regard to executive offices. But a law which establishes the office and defines its duties does not put the officer in place, or the law in process of execution. All that belongs to the executive department.

Look now at the character of the executive department. The Constitution of the United States vests all executive authority in the President. Wherever you find executive power to be exercised, he is the source and fountain from which it must proceed. This would be enough of itself, but, in addition to this, he alone, and not Congress, is required to see that the laws are faithfully executed, and he alone is required to take an oath to preserve, protect, and defend the Constitution of the United States. But how is he to execute the laws? Certainly not by his own hands. He cannot act as marshal or district attorney, or as a head of department. He must see that the laws are executed by the proper agents, and he must see to it that they are *faithfully* executed. It is not a barren, abstract duty imposed upon him, but a living obligation, with the sanction of an oath, not to be omitted under any circumstances. Wherever there is an unfaithful or improper officer, the President of the United States has not only the power but it is his duty to remove him. The truth is, it would be impossible to carry on this government under any other idea than that.

This idea of a participation of the Senate in all the constantly recurring questions of removal, requiring instant action for the safety of the public, would involve administration in inextricable confusion and difficulty. It would turn the Senate into the most corrupt of political bodies. It would fill this Senate chamber with cliques and favoritism. It would lead to constant cabals. One thousandth part of the cases requiring actual investigation could never be reached, and those that could be reached would consume the entire time of the Senate to the exclusion of all other public business. And, again, it would give time to unfaithful officers to defy the Executive, and looking to the Senate, grow bolder and bolder in their peculations.

The more we study our excellent Constitution the clearer it becomes that the wise men who framed it endeavored in all possible ways, by checks and balances, to keep the three great departments co-ordinate and separate, and, as far as possible, independent of each other. The judiciary department is made incapable of exercising any other than a judicial function; and, in general, such is the case with regard to the other two departments.

But there are cases plainly expressed where, under certain circumstances, the executive and legislative departments combine for certain purposes. A striking instance is in the matter of legislation, where, upon the final passage of a bill the Executive is given a qualified legislative power. So, too, in the formation of a treaty, which is strictly an executive duty, one branch of the legislature is allowed a participation. And lastly, in the executive business of appoint-

ments to office one branch of the legislature, that is to say, the Senate, is also allowed to participate. But, beyond these definite fixed points, there is no authority anywhere in the Constitution for the legislative department to exercise an executive power, or for the executive department to exercise a legislative power. The moment, therefore, the legislature assumes a right to participate in the executive power of removal, it claims a right to exercise an executive power in a matter for which it finds no grant or authority in the Constitution.

I stand, then, senators, on the constitutional power of the President to remove Mr. Stanton from office. If he did in fact possess that power what becomes of the tenure-of-office act, or anything else in the way of legislation? If it is a constitutional power which he possesses, how can it be taken away by any mode short of a constitutional amendment? Then, too, if he deems it his constitutional power, how can you punish him for following in good faith that oath which he has been compelled to take, that he "will preserve, protect, and defend the Constitution of the United States?"

Look, senators, at what has happened since the beginning of this trial. During the progress of the case, on the 31st of March, 1868, a question arose, in which the Senate, as a court of impeachment, were equally divided. Thereupon the Chief Justice decided the question in the affirmative by his casting vote. I make now the following extract from the minutes of the next day, April 1:

Mr. SUMNER. Mr. President, I send to the Chair an order which is in the nature of a correction of the journal.

The Secretary read as follows: It appearing from the reading of the journal of yesterday that on a question where the Senate were equally divided, the Chief Justice, presiding on the trial of the President, gave a casting vote, it is hereby declared that, in the judgment of the Senate, such vote was without authority under the Constitution of the United States.

Mr. SUMNER. On that question I ask for the yeas and nays.

The yeas and nays were ordered; and being taken, resulted—yeas 21, nays 27.

So the proposed order was rejected.

How near, Mr. Chief Justice, did you come to the commission of an impeachable offence, according to this modern doctrine announced here by the managers!

But it is said on behalf of the managers that although each department of the government may have the right to construe the Constitution for itself in the matter of its own action—that being so, the legislative department may carry out its own opinions of the Constitution to all their final results, even if thereby they totally absorb every power of the executive department. They are the sole judges of their own powers when called upon to act, and must decide for themselves. But if they have this ultimate power of decision, so also has the Executive; and if they have a right to enforce their construction against the Executive, so also has the Executive a right to enforce its construction against theirs. It was to meet that very contingency, it was to save us from such fatal consequences, that the wisdom of our forefathers introduced the judiciary department as the final arbiter of all such questions. That failing, there is but one alternative—an actual collision or a resort to the people themselves. This last is the great conservative element in our government. When this fails us all is gone. When the voice of the people ceases to be appealed to, or, being appealed to, ceases to be listened to, then faction and party will have accomplished their perfect work, and this frame of government will, like a worthless thing, be cast away.

Nothing is plainer than the duty of the Executive to resist encroachments of the legislative department. If he submits tamely to one usurpation of his rightful powers he may lose all. What is there to prevent the Congress of the United States from passing a law to take away from the President his veto power, and to make its exercise a high crime and misdemeanor, punishable by long imprisonment and made impeachable? What is there to prevent them, if left to the unrestrained exercise of their own power, from transferring the command

Digitized by Google

of the army and navy from the President to one of his subordinate officers, and making the attempt on his part to exercise his constitutional function a high crime, and subjecting him to imprisonment? The doctrine asserted by the managers saps the very foundation of our system, and turns our written Constitution into a mere mockery. Wherever a President is deliberately of opinion that an act of Congress calls upon him to exercise a power not given to him by the Constitution, he violates that Constitution if he follows it. Again, wherever he is called upon to execute a law which deprives him of a constitutional power, he violates the Constitution as well by executing it. A great trust is committed to his hands, sanctioned by a solemn oath, and he cannot surrender the one or violate the other.

And now, senators, I ask your close attention to what seems to me a most singular characteristic of this case. How does it happen that for the first time in the history of our country the President of the United States has been suddenly subjected to such punitive legislation as that which was passed on the 2d of March, 1867? Laws were passed on that day purporting to change the order of executive action. Such laws have not been uncommon either in our national or State legislatures. It has often happened that the legislative department has made changes in the manner of administration of the executive department—oftentimes imposing duties never imposed before; oftentimes prescribing action in the most direct and explicit terms. But where before has legislation of this sort been found attended with such pains and penalties as we find here?

Now, observe, senators, that neither in the punitive clauses of the second section of that military appropriation act, nor in the sixth section of that tenure-of-office act, is the President of the United States so much as mentioned. Whoever drew these acts shrunk from referring to the office by name. It is under the general description of "person" or "civil officer" that he is made liable to fine and imprisonment for failing to carry out the new provisions of law. But there is no question that it is the President, and the President alone, that is meant. The law was made for him; the punishment was made for him. He is left no choice, no chance of appeal to the courts, no mode of testing the validity of the new law. The rule is laid down for him, and the consequences of disobedience. The language in effect is, *this or the penitentiary. Do our bidding or take the consequences of impeachment.* I undertake to say that, in the history of legislation, nothing like this is anywhere to be found.

And now, senators, how do all these high-sounding phrases, importing high crimes and misdemeanors, found in these two acts of Congress, compare with the actual character of those acts called high crimes and misdemeanors in the text of the Constitution? I do not intend to argue this question upon precedent. That work has been effectually done by the learned manager, Mr. Wilson, and he has set at rest forever the pretence that there is any precedent that makes anything an impeachable offence but those crimes and misdemeanors punishable by indictment. But precedents here are out of place. The language of the Constitution is too plain to be misunderstood. The President is to be impeached only "on conviction of treason, bribery, or other high crimes and misdemeanors."

In these pregnant words the whole matter is settled. There is, first of all, an enumeration of what crimes are in the contemplation of the Constitution, treason and bribery; and they are the highest of official crimes that can be committed. If the Constitution had stopped there no doubt could exist. Would anything short of treason have sufficed for an article of impeachment—anything even amounting to misprision of treason, or even that modern crime in English law, treason-felony? Could any case have been made against the President under an article alleging treason short of actual levying of war or giving aid and comfort to the enemies of the United States? Then, as to bribery, would anything

Digitized by Google

short of actual bribery have sufficed? Would an attempt to bribe—an act almost equal to bribery, yet just short of it? Certainly not.

Besides these two enumerated crimes follows that other phrase, "other high crimes and misdemeanors." What sort of crimes and misdemeanors? Why, such as are assimilated to those that are enumerated; not all crimes and misdemeanors, but such as are of a similar character with those enumerated, and which are raised by express classification to high grades known, recognized, and established. They are crimes and misdemeanors, says Mr. Burke, not of form, but of essence. You cannot call that a high crime and misdemeanor which in the nature of things is not. There is no room for cunning manufacture here. If a legislative act should undertake to declare that the commonest assault and battery should be a high crime and misdemeanor under the Constitution, that would not change its essence or make it the high offence which the Constitution requires.

I hope it may not be found out of place nor unworthy of the occasion to call the attention of the court to a case parallel, in my judgment, to this:

First Watch. This man said, sir, that Don John, the prince's brother, was a villain.
Dogberry. Write down—Prince John, a villain;—why, this is flat perjury, to call a prince's brother—villain.
Sexton. What heard you him say else?
Second Watch. Marry, that he had received a thousand ducats of Don John for accusing the lady Hero wrongfully.
Dogberry. Flat burglary as ever was committed.
Verges. Yea, by the mass, that it is.

Look through all the correlative provisions of the Constitution on the subject, as to trial, conviction, judgment, and punishment, as to pardons, and, last of all, to that provision that "the trial of all crimes, except in cases of impeachment, shall be by jury," and that other provision, that after conviction on impeachment "the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law." If you are not yet satisfied examine the proceedings of the convention that framed this article, and see how studiously they rejected all impeachment for misbehavior in office, and how steadily they adhered to the requisition that nothing but a high crime and misdemeanor should suffice.

The honorable managers have put the case of *insanity*. But will you add to that awful visitation of Providence the impious judgment of man, that the sufferer is guilty of a high crime and misdemeanor? As to the President, however, the case of insanity is provided for, not by removal, not by impeachment, but by the temporary devolution of the office upon the Vice-President.

Senators, was there ever a more abortive attempt to make a case for impeachment of the President under the Constitution? This bantling of impeachment from the first showed few signs of vitality. There was never any real life in it. It has been nursed by the managers with the greatest care, especially by that honorable manager whose business it was first to bring it to the notice of the Senate. He dandled the bantling in his arms with consummate skill. He pinched its poor wan cheeks for some show of life, but even then it was too evident that it was *in articulo mortis*. The nurse was skilful, but the subject, with all its care, was beyond his art. Long since this show of vitality vanished, and now it lies, bereft of life, a shapeless mass which gives no sign, scarcely a grim contortion, the counterfeit resemblance of life under the galvanic touch of high party excitement.

There is one other point, senators, to which it is perhaps proper I should call attention. I understand it to be argued by the managers that the *ad interim* authority given to General Thomas was in violation of law, and that, aside from any question growing out of the tenure-of-office act, there was no law or authority to justify that appointment. But is it possible, even if such an error as that had been committed by the President, it would make him liable to

Digitized by Google

impeachment? In the course of the administration of the affairs of this government in the great departments many things are done almost every day for which it is impossible to find warrant of law. They are done, however, in good faith, done sometimes under a great necessity, and finally grow up into usages apparently contrary to law, yet which are even winked at by courts when brought to the test of a decision. But for myself, after the most thorough investigation of the state of the law as to *ad interim* appointments, I am unable to see that there has been any violation of law in this *ad interim* appointment, or rather in this attempt to make an *ad interim* appointment.

The Constitution contains only the following provision as to vacancies:

> The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

This is a very different thing from an *ad interim* appointment. The case contemplated by the Constitution is in no sense an *acting* or *ad interim* authority. The appointment and commission there required fill the vacancy with a regular officer. But immediately after the formation of the Constitution, in the administration of the government, emergencies at once arose in the executive department requiring instant action. Suddenly an unexpected vacancy in an office required at once a *locum tenens* to carry on the business, before there was time to select a new officer, to know of his acceptance, or to induct him into office. So, too, there being no vacancy, a temporary disability might occur from sickness or necessary absence, which also required some one to act during the *interim*. It was to meet these unforeseen contingencies, which were nowhere provided for in the Constitution, that acts of Congress were passed in the years 1792, 1795, and 1863.

It is in the review of these various acts of Congress that it is claimed on the part of the managers that there is no authority of law for making a temporary appointment in case of an office made vacant by removal, which was claimed by the President to be the case as to Mr. Stanton. They maintain that if the order of the President did remove Mr. Stanton, if by its own constitutional power it had that effect, if it was a lawful order, yet the President committed a violation of law in attempting to put an *ad interim* appointee there, just because it was a vacancy caused by removal. They claim that the act of 1863 regulates the whole matter, and inasmuch as that gives no authority for an *ad interim* appointment to a vacancy caused by removal, no such authority is to be looked for in the other statutes.

A mere reference to the prior legislation will show the fallacy of this argument. The act of 1792 provided for *ad interim* appointments in these cases alone: vacancy occasioned by death or by disability from absence or sickness. It will be observed that this act made no provision for an *ad interim* appointment in case of a vacancy by resignation, by expiration of term, or by removal. Next came the act of 1795, and this provides for an *ad interim* appointment in case of any vacancy whatsoever. It extends, therefore, to all forms of vacancy, whether by death, resignation, removal, or expiration of term of office; and wherever such vacancy exists power is given to the President to authorize any person to perform the official duties until the vacancy is filled, but limits the time for such temporary authority to the period of six months. Next comes the act of 1863, and this applies to temporary appointments in only two cases of vacancy—those caused by death and by resignation, omitting any provision as to vacancies caused by expiration of term or by removal. Like the act of 1795, it limits the time of the temporary authority to six months.

There is no express repeal in the act of 1863 of any former act. It only purports to repeal such acts and parts of acts as are inconsistent with it. Now, comparing the act of 1795 with the act of 1863, I am unable to see any inconsistency between the two acts. It is true that, as to vacancies occasioned by death or resignation, both acts equally apply; and the most that can be said of

the last is that it is cumulative. But as to vacancies occasioned by expiration of term and by removal from office, inasmuch as there is no provision whatever in the act of 1863 as to those vacancies, they remain as fixed by the act of 1795. For certainly, as to those vacancies so provided for by the act of 1795, there is no inconsistency between that and the act of 1863, which is without any provision whatever on those subjects-matter. There is, therefore, not even a pretense here of repeal by implication.

Very much, however, is said as to those *ad interim* appointments made during the session of the Senate, as if that were a circumstance of any weight or consequence whatever with regard to an *ad interim* appointment. It will be seen that not one of these laws distinguishes as to time of recess or time of session in regard to the authority of the President to make these *ad interim* appointments. The question is, when does the necessity arise, not whether it is during the recess or session of the Senate. And such has been the uniform construction given to these acts from the beginning of the government to this day. These *ad interim* appointments are made indifferently, whether the Senate is in session or in recess.

Hitherto, senators, I have considered this case in its legal aspects, and it seems to me that the argument may very well stop here. Whatever there is of matter of fact in the case adds greatly to the President's defence. Look through the proof adduced by the managers outside of the mere formal documentary exhibits. What is there left but the testimony as to the speeches? What is there that has the slightest bearing upon the case of the President except what they have attempted to force into the case by the declarations of General Thomas?

We have heard from the managers, especially from that manager who opened the case on the part of the prosecution, many high-sounding declarations of what they expected to prove. But what a total failure we have seen in the way of performances! Look, now, with what a flourish of trumpets the declarations of General Thomas as to his purposes and intents were heralded before the court. On page 180 of the printed record we find the following:

Mr. Manager BUTLER presented the question in writing at the Secretary's desk.

The CHIEF JUSTICE. The Secretary will read the question.

The Secretary read the following question proposed to be put to the witness, Walter A. Burleigh:

"You said yesterday, in answer to my question, that you had a conversation with General Lorenzo Thomas on the evening of the 21st of February last. State if he said anything as to the means by which he intended to obtain, or was directed by the President to obtain, possession of the War Department. If so, state all he said as nearly as you can."

Mr. STANBERY. We object, Mr. Chief Justice.

The CHIEF JUSTICE. Do you desire to make any observations to the court?

Mr. STANBERY. We do, sir.

The CHIEF JUSTICE. The question will be submitted to the Senate.

Mr. FRELINGHUYSEN. Mr. President, I desire to submit a question.

The CHIEF JUSTICE. The Secretary will read the question submitted by the senator from New Jersey [Mr. Frelinghuysen] to the managers.

The Secretary read as follows:

"Do the managers intend to connect the conversation between the witnesses and General Thomas with the respondent?"

The CHIEF JUSTICE. Are the managers prepared to reply to the question?

Mr. Manager BUTLER. Mr. President, if the point is to be argued, with the leave of the Senate, we will endeavor to answer that question in the argument.

The CHIEF JUSTICE. It is to be argued. The manager will proceed, if he desires.

Mr. STANBERY. We do not hear the answer.

Mr. Manager BUTLER. The answer is, Mr. President, if you will allow me to repeat it, that, as I understand the point raised is to be argued on the one side and the other, we will endeavor to answer the question submitted by the senator from New Jersey in the course of our argument.

Mr. TRUMBULL. Mr. President, I should like to hear the question read again, as I think the answer to the inquiry of the senator from New Jersey is in the question propounded by the managers, as I heard it.

Digitized by Google

The CHIEF JUSTICE. The Secretary will read the question again. Senators will please give their attention.

The Secretary again read the question of Mr. Manager Butler.

The CHIEF JUSTICE. Do the managers propose to answer the question of the senator from New Jersey?

Mr. Manager BUTLER. If there is to be no argument, Mr. President, I will answer the question proposed. If there is to be an argument on the part of the counsel for the President, we propose, as a more convenient method, to answer the question in the course of our argument, because otherwise we might have to make an argument now. I can say that we do propose to connect the respondent with this testimony.

Now, senators, I ask you whether that pledge under which that testimony was admitted has been redeemed?

I will make one more reference to the proof. It is upon the question as to the intention of the President to bring the constitutionality of the tenure-of-office act to the final arbitrament of the Supreme Court. He sets that defence up in his answer. He alleges that that intention has accompanied every act touching the suspension and removal of Mr. Stanton, and that he has never lost sight of it. If everything else were ruled against the President this great exculpatory fact must shield him.

Now listen to Mr. Manager Butler upon this question. On page 96 of the record he says:

> Indeed, will you hear an argument as a Senate of the United States, a majority of whom voted for that very bill, upon its constitutionality, in the trial of an executive officer for willfully violating it before it had been doubted by any court?
>
> Bearing upon this question, however, it may be said that the President removed Mr. Stanton for the very purpose of testing the constitutionality of this law before the courts, and the question is asked, Will you condemn him as for a crime for so doing? If this plea were a true one it ought not to avail, but it is a *subterfuge*. We shall show you that he has taken no step to submit the question to any court, although more than a year has elapsed since the passage of the act.

Senators, where has this been shown on the part of the managers? Where is there even a feeble attempt to show it? But look now to the proof on the part of the President. Cabined, cribbed, and confined as we have been by the rulings of the Senate upon this question, yet what appears? From first to last, the great fact forces itself upon our attention that this was no subterfuge of the President, no after-thought to escape the consequences of an act, but, on the contrary, that this wholesome and lawful purpose of a resort to the proper tribunal to settle the difficulty between Congress and himself was in the mind of the President from the very beginning. They proved it by his own declarations introduced by themselves in his letter to General Grant, dated February 10, 1868, which may be found on page 234 of the printed record. One extract from that letter will suffice. The President says:

> You knew the President was unwilling to trust the office with any one who would not, by holding it, compel Mr. Stanton to resort to the courts. You perfectly understood that in this interview, "some time" after you accepted the office, the President, not content with your silence, desired an expression of your views, and you answered him that Mr. Stanton "would have to appeal to the courts."

If this is not enough, senators, remember the testimony of General Thomas, of General Sherman, of Mr. Cox, of Mr. Merrick, and see throughout the purpose of the President, declared at all times, from first to last, to bring this question to judicial arbitrament. After all this, what a shocking perversion of testimony it is to pronounce it an after-thought or a subterfuge! And after the proof of what took place on that trial of Thomas, how can the managers be bold enough to say that they will "show you that he has taken no step to submit the question to any court, although more than a year has elapsed since the passage of the act?"

Senators, it was not at all necessary for the defence of the President that, in the exercise of that discretion which the law allows to him, he should be put to prove that his intentions were all right. He has gone far beyond the necessities of his case. Never were good intentions and honest motives more thor

Digitized by Google

oughly proved than they have been proved in this case. I repeat it, that, if everything else were made out against him, this great exculpatory fact must absolve him from all criminal liability.

And now, senators, I have done with the law and the facts of the case. There remains for me, however, a duty yet to be performed—one of solemn import and obligation—a duty to my client, to my former chief, to my friend. There may be those among you, senators, who cannot find a case of guilt against the President. There may be those among you who, not satisfied that a case for impeachment has yet arisen, are fearful of the consequences of an acquittal. You may entertain vague apprehensions that, flushed with the success of an acquittal, the President will proceed to acts of violence and revolution. Senators, you do not know or understand the man. I cannot say that you wilfully misunderstand him; for I, too, though never an extreme party man, have felt more than once, in the heat of party conflicts, the same bitter and uncompromising spirit that may now animate you. The time has been when I looked upon General Jackson as the most dangerous of tyrants. Time has been when, day after day, I expected to see him inaugurate a revolution; and yet, after his administration was crowned with success and sustained by the people, I lived to see him gracefully surrender his great powers to the hands that conferred them, and, under the softening influences of time, I came to regard him, not as a tyrant, but as one of the most honest and patriotic of men.

Now, listen for a moment to one who, perhaps, understands Andrew Johnson better than most of you; for his opportunities have been greater. When, nearly two years ago, he called me from the pursuits of professional life to take a seat in his cabinet, I answered the call under a sense of public duty. I came here almost a stranger to him and to every member of his cabinet except Mr. Stanton. We had been friends for many years. Senators, need I tell you that all my tendencies are conservative? You, Mr. Chief Justice, who have known me for the third of a century, can bear me witness. Law, not arms, is my profession. From the moment that I was honored with a seat in the cabinet of Mr. Johnson not a step was taken that did not come under my observation, not a word was said that escaped my attention. I regarded him closely in cabinet, and in still more private and confidential conversation. I saw him often tempted with bad advice. I knew that evil counsellors were more than once around him. I observed him with the most intense anxiety. But never, in word, in deed, in thought, in action, did I discover in that man anything but loyalty to the Constitution and the laws. He stood firm as a rock against all temptation to abuse his own powers or to exercise those which were not conferred upon him. Steadfast and self-reliant in the midst of all difficulty, when dangers threatened, when temptations were strong, he looked only to the Constitution of his country and to the people.

Yes, senators, I have seen that man tried as few have been tried. I have seen his confidence abused. I have seen him endure, day after day, provocations such as few men have ever been called upon to meet. No man could have met them with more sublime patience. Sooner or later, however, I knew the explosion must come. And when it did come my only wonder was that it had been so long delayed. Yes, senators, with all his faults, the President has been more sinned against than sinning. Fear not, then, to acquit him. The Constitution of the country is as safe in his hands from violence as it was in the hands of Washington. But if, senators, you condemn him, if you strip him of the robes of his office, if you degrade him to the utmost stretch of your power, mark the prophecy: The strong arms of the people will be about him. They will find a way to raise him from any depths to which you may consign him, and we shall live to see him redeemed, and to hear the majestic voice of the people, "Well done, faithful servant; you shall have your reward!"

But if, senators, as I cannot believe, but as has been boldly said with almost

Digitized by Google

official sanction, your votes have been canvassed and the doom of the President is sealed, then let that judgment not be pronounced in this Senate chamber; not here, where our Camillus in the hour of our greatest peril, single-handed, met and baffled the enemies of the republic; not here, where he stood faithful among the faithless; not here, where he fought the good fight for the Union and the Constitution; not in this chamber, whose walls echo with that clarion voice that, in the days of our greatest danger, carried hope and comfort to many a desponding heart, strong as an army with banners. No, not here. Seek out rather the darkest and gloomiest chamber in the subterranean recesses of this Capitol, where the cheerful light of day never enters. There erect the altar and immolate the victim.

Mr. Stanbery, after proceeding sometime, said: With the consent of the Senate, Mr. Chief Justice, to relieve me I would ask permission that my young friend at my side may read from my brief a few pages, while I gather a little strength for what I wish to say.

Mr. ANTHONY. The counsel is evidently laboring very painfully in his endeavor to address the Senate, and I move that the Senate, sitting as a court of impeachment, adjourn until Monday at 12 o'clock.

Several SENATORS. Oh, no; let the argument be read.

Mr. STANBERY. I do not ask an adjournment.

Mr. ANTHONY. I withdraw the motion if the counsel does not desire it.

Mr. Washington F. Peddrick thereupon proceeded to read the argument, and continued the reading until 2 minutes to 2 o'clock, when

Mr. JOHNSON. I move that the court take a recess for fifteen minutes.

The motion was agreed to; and at the expiration of the recess the Chief Justice resumed the chair and called the Senate to order.

Mr. Peddrick continued to read the argument for some time.

Mr. Stanbery having resumed and concluded his argument,

Mr. HOWARD. I move that the Senate sitting for the trial of the impeachment, adjourn until Monday at 12 o'clock.

The motion was agreed to; and the Senate, sitting for the trial of the impeachment, adjourned.

MONDAY, *May* 4, 1868.

The Chief Justice of the United States took the chair.

The usual proclamation having been made by the Sergeant-at-arms,

The managers of the impeachment on the part of the House of Representatives and Messrs. Nelson and Groesbeck, of counsel for the respondent, appeared and took the seats assigned to them respectively.

The members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

The journal of Saturday's proceedings of the Senate, sitting for the trial of the impeachment, was read.

The CHIEF JUSTICE. Mr. Manager Bingham will proceed with the argument on the part of the House of Representatives.

Hon. JOHN A. BINGHAM, one of the managers of the impeachment on the part of the House of Representatives, commenced the closing argument, as follows:

Mr. PRESIDENT and SENATORS: I protest, senators, that in no mere partisan spirit, in no spirit of resentment or prejudice do I come to the argument of this grave issue. A representative of the people, upon the responsibility

and under the obligation of my oath, by order of the people's representatives, in the name of the people, and for the supremacy of their Constitution and laws, I this day speak. I pray you, senators, "hear me for my cause." But yesterday the supremacy of the Constitution and laws was challenged by armed rebellion; to-day the supremacy of the Constitution and laws is challenged by executive usurpation, and is attempted to be defended in the presence of the Senate of the United States.

For four years millions of men disputed by arms the supremacy of American law on American soil. Happily for our common country, happily for our common humanity, on the 9th day of April, in the year of our Lord 1865, the broken battalions of treason and armed resistance to law surrendered to the victorious legions of the republic. On that day, not without sacrifice, not without suffering, not without martyrdom, the laws were vindicated. On that day the word went out all over our own sorrow-stricken land and to every nationality that the republic, the last refuge of constitutional liberty, the last sanctuary of an inviolable justice, was saved by the virtue and valor of its children.

On the 14th day of April, in the year of our Lord 1865, amid the joy and gladness of the people for their great deliverance, here in the capital, by an assassin's hand, fell Abraham Lincoln, President of the United States, slain not for his crimes, but for his virtues, and especially for his fidelity to duty—that highest word revealed by God to man.

Upon the death of Abraham Lincoln, Andrew Johnson, then Vice President, by force of the Constitution became President of the United States, upon taking the prescribed oath that he would faithfully execute the office of President, and preserve, protect, and defend the Constitution of the United States. The people, bowing with uncovered head in the presence of the strange, great sorrow which had come upon them, forgot for the moment the disgraceful part which Andrew Johnson had played here upon the tribune of the Senate on the 4th day of March, 1865, and accepted the oath thus taken by him as the successor of Abraham Lincoln as confirmation and assurance that he would take care that the laws be faithfully executed. It is with the people an intuitive judgment, the highest conviction of the human intellect, that the oath faithfully to execute the office of President, and to preserve, protect, and defend the Constitution of the United States, means, and must forever mean—while the Constitution remains as it is—that the President will himself obey, and compel others to obey, the laws enacted by the legislative department of the government, until the same shall have been repealed or reversed. This, we may assume, for the purpose of this argument, to be the general judgment of the people of this country. Surely it is the pride of every intelligent American that none are above and none beneath the laws; that the President is as much the subject of law as the humblest peasant on the remotest frontier of our ever advancing civilization. Law is the only sovereign, save God, recognized by the American people; it is a rule of civil action not only to the individual, but to the million; it binds alike each and all, the official and the unofficial, the citizen and the great people themselves.

This, senators—pardon me for saying it—is of the traditions of the republic, and is understood from the Atlantic to the Pacific shores by the five and thirty millions of people who dwell between these oceans and hold in their hands to-day the greatest trust ever committed in the providence of God to a political society.

I feel myself justified, entirely justified, in saying that it rests not simply upon the traditions of the people, but is embodied in their written record from the day when they fired the first gun on the field of Lexington to this hour. Is it not declared in that immortal declaration which will live as long as our language lives, as one of the causes of revolt against the king of Great Britain, whose character was marked by every act which may define a tyrant, that he had forbidden his governors to pass laws, unless suspended in their operation

until they should have received his assent—I use the words of the declaration, which, like the words of Luther, were half battles—the law should be suspended until his assent should be obtained. That was the first utterance against the claim of executive power to suspend the laws by those immortal men with whom God walked through the night and storm and darkness of the Revolution, and whom he taught to lay here at the going down of the sun the foundations of those institutions of civil and religious liberty which have since become the hope of the world.

I follow the written record further, still asking pardon of the Senate, praying them to remember that I speak this day not simply in the presence of senators, but in the presence of an expecting and waiting people, who have commissioned you to discharge this high trust, and have committed to your hands, senators, the issues of life and death to the republic. I refer next to the words of Washington, first of Americans and foremost of men, who declared that the Constitution, which at any time exists until changed by the act of the whole people, is sacredly obligatory upon all.

I refer now to a still higher authority, which is the expression of the collective power and will of the whole people of the United States, in which it is asserted that—

> This Constitution, and the laws made in pursuance thereof, and all treaties made or which shall be made by the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution and laws of any State to the contrary notwithstanding.

That is the solemn declaration of the Constitution itself; and pending this trial, without a parallel in the history of the nation, it should be written upon these walls.

How are these propositions, so plain and simple that "the wayfaring man could not err therein," met by the retained counsel who appear to defend this treason of the President, this betrayal of the great trusts of the people? The proposition is met by stating to the Senate, with an audacity that has scarcely a parallel in the history of judicial proceedings, that every official may challenge at pleasure the supreme law of the land, and especially that the President of the United States, charged by his oath, charged by the express letter of the Constitution, that "he shall take care that the laws be faithfully executed," is nevertheless invested with the power to interpret the Constitution for himself, and to determine judicially—senators, I use the word used by the learned gentleman who opened the case for the accused—to determine judicially whether the laws declared by the Constitution to be supreme are after all not null and void, because they do not happen to accord with his judgment.

This is the defence which is presented here before the Senate of the United States, and upon which they are asked to deliberate, that the Executive is clothed with power judicially—I repeat their own word, and I desire that it may be burned into the brain of senators when they come to deliberate upon this question—that the President may judicially construe the Constitution for himself, and judicially determine finally for himself whether the laws, which by your Constitution are declared to be supreme, are not, after all, null and void and of no effect, and not to be executed, because it suits the pleasure of his highness, Andrew Johnson, first king of the people of the United States, in imitation of George III, to suspend their execution. He ought to remember, when he comes with such a defence as that before the Senate of the United States, that it was said by one of those mighty spirits who put the Revolution in motion and who contributed to the organization of this great and powerful people, that Cæsar had his Brutus, Charles I had his Cromwell, and George III should profit by their example. Nevertheless—and this is the central point of this entire discussion—the position is assumed here in the presence of the Senate, in the presence of the people of the United States, and in the presence of

the civilized world, that the President of the United States is invested with the judicial power to determine the force and effect of the Constitution, of his own obligations under it, and the force and effect of every law passed by the Congress of the United States. It must be conceded, if every official may challenge the laws as unconstitutional, and especially if the President may, at his pleasure, declare any act of Congress unconstitutional, reject, disregard, and violate its provisions, and this, too, by the authority of the Constitution, that instrument is itself a Constitution of anarchy, not of order, a Constitution authorizing a violation of law, not enjoining obedience to law. Senators, establish any such rule as this for official conduct, and you will have proved yourselves the architects of your country's ruin; you will have converted this land of law and order, of light and knowledge, into a land of darkness, the very light whereof will be darkness—a land

> "Where eldest Night
> And Chaos, ancestors of nature, will hold
> Eternal anarchy, amidst the noise
> Of endless wars, and by confusion stand."

Disguise, gloze over, and, by specious and ingenious argument, excuse the President's acts, as gentlemen may, the fact is that we are passing upon the question whether the President may not, at his pleasure, and without peril to his official position, set aside and annul both the Constitution and laws of the United States, and in his great office inaugurate anarchy in the land.

The whole defence of the President rests upon the simple but startling proposition that he cannot be held to answer for any violation of the written Constitution and laws of the United States, because of his asserted right under the Constitution, and by the Constitution, to interpret for himself and execute or disregard, at his election, any provision either of the Constitution or statutes of the United States.

No matter what demagogues may say of it outside of this chamber, no matter what retained counsel may say of it inside of this chamber, that is the issue; and the recording angel of history has already struck it into the adamant of the past, there to remain forever; and upon that issue, senators, you and the House of Representatives will stand or fall before the tribunal of the future That is the issue. It is all there is of it. It is what is embraced in the articles of impeachment. It is all that is embraced in them. In spite of the technicalities, in spite of the lawyer's tricks, in spite of the futile pleas that have been interposed here in the President's defence, that is the issue. It is the head and front of Andrew Johnson's offending, that he has assumed to himself the executive prerogative of interpreting the Constitution and deciding upon the validity of the laws at his pleasure, and suspending them and dispensing with their execution.

I say it again, senators, with every respect for the gentlemen who sit here as the representatives of States and the representatives as well of that great people who are one people though organized by States, that the man who has heard this prolonged discussion, running through days and weeks, who does not understand this to be the plain, simple proposition made in the hearing of senators, insisted upon as the President's defence, is one of those unfortunates whom even a thrush might pity, to whom God in his providence has denied the usual measure of that intellectual faculty which we call reason.

In the trial of this case the Senate of the United States is the sole and only tribunal which can judicially determine this question. The power to decide it is with the Senate; the responsibility to decide it aright is upon the Senate. That responsibility can be divided by the Senate with no human being outside of this chamber. It is all-important to the people of the United States at large as it is all-important to their representatives in Congress assembled, and surely it is all-important to the senators, sworn to do justice in the premises between

Digitized by Google

the people and the President, that this great issue which touches the nation's life shall be decided in accordance with the spirit as well as with the letter of the Constitution. It is all-important that it shall be decided in accordance with that justice to establish which the Constitution itself was ordained; that justice before the majesty of which we this day bow as before the majesty of that God whose attribute it is; that justice which dwelt with Him before worlds were, which will abide with Him when worlds perish, and by which we shall be judged for this day's proceeding.

The Senate, having the sole power to try impeachments, must of necessity be vested by every intendment of the Constitution with the sole and exclusive power to decide every question of law and of fact involved in the issue. And yet, senators, although that would seem to be a self-evident proposition, hours have been spent here to persuade the Senate of the United States that the Senate at last had not the sole power to try every issue of law and fact arising upon this question between the people and the President. The ex-Attorney General well said the other day, for he quoted a familiar canon of interpretation, "Effect must be given to every word in a written statute." Let effect be given to every word in the written statute of the people—their fundamental law, the Constitution of the United States—and there is an end of all controversy about the exclusive power of the Senate to decide every question of law and fact arising upon this issue.

What meant this long-continued discussion on the part of the counsel for the President, resting upon a remark of my colleague [Mr. Manager Butler] in his opening on behalf of the people that this was not a court? Was it an attempt to divert the Senate from the express provision of the Constitution that the Senate should be the sole and final arbiters between the people and the President? What meant this empty criticism about the words of my colleague that this was not a court, but the Senate of the United States? My colleague, Mr. Chief Justice, simply followed the plain words of the Constitution, that "the Senate shall have the sole power to try all impeachments."

I propose neither to exhaust my strength nor the patience of the Senate by dwelling upon this miserable device to raise an issue between the Senate and the courts, because that is what it resulted in at last, although it came after a good deal of deliberation, after a good many days of incubation, after many utterances on many subjects concerning things both in the heavens above and in the earth beneath and in the waters under the earth. I do not propose to imitate the example of the learned and accomplished counsel of the President on the trial of this grave issue, which carries with it so many and so great results to all the people of the United States, not only of this day but of the great hereafter. I trust I shall be saved in the providence of God, by his grace, from becoming, as have some of the counsel for the President in this august presence, a mere eater-up of syllables, a mere snapper-up of unconsidered trifles. I propose to deal in this discussion with principles, not with "trifles light as air." I care not if the gentlemen choose to call the Senate sitting in the trial of an impeachment a court. The Constitution calls it the Senate. I know, as every intelligent man knows, that the Senate of the United States, sitting upon the trial of impeachment, is the highest judicial tribunal of the land. That is conceding enough to put an end to all that was said on that point—some of it most solemnly—by the stately argument of the learned gentleman from Massachusetts, [Mr. Curtis;] some of it most tenderly by the effective and adroit argument of my learned and accomplished friend from Ohio, [Mr. Groesbeck;] and some of it most wittily—so wittily that he held his own sides lest he should explode with laughter at his own wit—by the learned gentleman from New York, [Mr. Evarts,] who displayed more of Latin than of law in his argument, and more of rhetoric than of logic, and more of intellectual pyrotechnics than of either. [Laughter.]

Digitized by Google

But, senators, I am not to be diverted by these fireworks, by these Roman candles, by these fiery flying serpents that are let off at pleasure, and to order, by the accomplished gentleman from New York, from the solemn issue joined here between the people and the President. I stand upon the plain, clear letter of the Constitution, which declares that "the Senate shall have the sole power to try all impeachments;" that it necessarily invests the Senate with the sole and exclusive power to determine finally and forever every issue of law and fact arising in the case. This is one of those self-evident propositions arising under the Constitution of the United States of which Hamilton spoke in words clear and strong, which must carry conviction to the mind of every man, and which I beg leave to read in the hearing of the Senate.

Said Hamilton, a man who was gifted by Providence with one of those commanding intellects, whose thoughts indelibly impressed themselves wherever they fell:

> This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it, and may be obscured but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal—the *means* ought to be proportioned to the *end;* the persons from whose agency the attainment of any *end* is expected ought to possess the *means* by which it is to be attained.

The end required by the letter of your Constitution of the Senate of the United States is that the Senate decide finally and for themselves every issue of law and fact arising between the people and their accused President. What comes, then, I want to know, senators, of the argument of the learned gentleman from New York? The most significant lesson to be gathered from which is this: that the right way and the effectual way by which a man may make his speech immortal is to make it eternal. [Laughter.] What becomes of his long, drawn-out sentence here about the right of this accused and guilty man, who stands this day clothed with perjury as with a garment in the presence of the people, to be heard first in the Supreme Court of the United States before the Senate shall proceed to trial and judgment? The Senate is vested with the sole and exclusive power to try this question, and the Supreme Court of the United States has no more power to intervene either before or after judgment in the premises than has the Court of St. Petersburg; and so the people of the United States, I hesitate not to say, will hold.

Nevertheless, clear and manifest as this proposition is, it has been insisted upon here from the opening of this defence to its close by all the counsel who have participated in the discussion, that the Supreme Court is the final arbiter for the decision of all questions arising under the Constitution. I do not state the propcsition too broadly, senators. My occupations have been of such a nature, from the commencement of this trial to this hour, that I have relied more upon my memory of what counsel said than upon any reading which I have given to their voluminous arguments in defence of the accused; but I venture to say that the proposition is not more broadly stated by me than it has been stated by them.

I submit to the Senate that the proposition for the defence is not warranted by the Constitution; that there are many questions arising under the Constitution of the United States which by no possibility can be considered as original questions, either in the Supreme Court or in any other court of the United States. For example, my learned and accomplished friend who honors me with his attention, and represents the great and growing Commonwealth of Illinois upon this floor, [Mr. TRUMBULL,] is here and is to remain here, not by force of any decision which the Supreme Court of the United States has made, or by force of any decision which the Supreme Court of the United States may hereafter make. It is not a question within their jurisdiction. Illinois is one of those great Commonwealths which, since the organization of the Constitution and within the memory of living men, have sprung up from the shores of the beautiful Ohio

Digitized by Google

away to the golden sands of California, girdling the continent across with a cordon of free Commonwealths under the direct operation of the Constitution of the United States. The people by that Constitution did provide that the Congress shall have power to admit new States into the Union, and when the Congress passed upon the question whether the people of Illinois had organized a government republican in form, and were entitled to assume their place in the sisterhood of free Commonwealths, the decision was final, and the judge of the Supreme Court who dares to challenge the great seal of the State of Illinois, which the gentleman represents, ought to be instantly ejected from his place, which he would thereby dishonor and disgrace, by the supreme power of the people speaking and acting through the process of impeachment.

It does not belong in any sense of the word to the judicial power of the United States to decide all questions arising under the Constitution and laws. Why, according to this logic, the Supreme Court would come to sit in judgment at last upon the power given exclusively to each house to judge of the election and qualification of its own members. Senators, the judicial power of the United States is entitled to all respect and to all consideration here and everywhere else; but that judicial power, as is well known to senators, is defined and limited by the terms of the Constitution, and beyond those limitations or outside of those grants that tribunal cannot go. I read from the Constitution the provision in answer to the argument of the gentleman touching the judicial power of the United States:

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * *
>
> The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting embassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects.
>
> In all cases affecting embassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.—*Constitution*, article 3.

As I said before, inasmuch as the Senate of the United States has the sole power to try all impeachments, and therefore the exclusive power to finally determine all questions arising therein, it results that its decisions can neither be restricted by judgments in advance, made by either the Supreme Court or any other court of the United States, nor can the final judgment of the Senate upon impeachment be subjected to review by the civil courts of the United States or to reversal by executive pardon. So it is written in the Constitution, that the pardoning power shall not extend to impeachments. Impeachment is not a case in "law or equity," within the meaning of the terms as employed in the third article of the Constitution, which I have just read. It is in no sense a case within the general judicial power of the United States.

Senators, no one is either bold enough or weak enough to stand in the presence of the Senate of the United States and clearly and openly proclaim and avow that the Supreme Court has the power to try impeachments. Nevertheless, the position assumed in this defence for the accused that he may suspend the laws, dispense with their execution, and interpret and construe the Constitution for himself to the hurt of the republic, without peril to his official position, if he accompanies it either at the time or after the fact with a statement that his only object in violating the Constitution or in suspending the laws and dispensing with their execution was to obtain at some future day a judicial construction of the one or a judicial decision upon the validity of the other, the Senate

is not to hold him to answer upon impeachment for high crimes and misdemeanors, does involve the proposition, and no man can get away from it, that the courts at last have a supervising power over this unlimited and unrestricted power of impeachment vested by the people in the House of Representatives, and this unrestricted power to try all impeachments vested by the people in the Senate. On this proposition I am willing to stand, defying any man here or elsewhere to challenge it successfully. The position assumed by the accused means that or it means nothing. If it does not mean that it is like unto—

A tale told by an idiot,
Full of sound and fury, signifying nothing.

Just nothing. Now, I ask you, senators, what colorable excuse is there for presenting any such monstrous proposition as this to the consideration of the Senate of the United States? I think myself in this presence justified in reiterating the words of John Marshall upon one occasion, that it is reasonable to presume that the Senate knows something.

The original jurisdiction of the Supreme Court of the United States cannot by any possibility extend to a case of impeachment. Senators will please remember the text of the Constitution which I have just read, that the original jurisdiction of the Supreme Court of the United States is by the express letter of the Constitution restricted to foreign embassadors, other public ministers, and consuls, and to cases in which a State may be a party. The accused is not a foreign embassador; the accused is not a foreign minister; the accused is not a consul; and the accused is not, as yet, thank God, "the state." Therefore, the accused is not within the original jurisdiction of the Supreme Court of the United States.

When the gentlemen were dwelling so learnedly and so long upon this question, and reading from the great case of Marbury *vs.* Madison, they ought to have remembered that the Chief Justice who pronounced that decision, and whose intellect, full-orbed, shed a steady and luminous light on the jurisprudence of the country for the third of a century, declared, what no man has since questioned, that the original jurisdiction of the Supreme Court, as defined in this text of the Constitution, could neither be enlarged nor restricted by congressional enactment. These gentlemen ought to have remembered, further, when they invoked the intervention of the Supreme Court or any other court between the people and this accused President, that the appellate jurisdiction of the Supreme Court, by numerous decisions, depends exclusively under the Constitution upon the will of Congress. It results, therefore, that they must go to some other tribunal for the settlement of this great question between the people and the President, unless Congress chooses to let them go to the Supreme Court by a special enactment for their benefit. The appellate jurisdiction, senators, of the Supreme Court, as defined in the Constitution by words clear and plain and incapable of any misunderstanding or misconstruction, excludes the conclusion that a case of impeachment can by any possibility be within the jurisdiction of any of the courts of the United States, either its district, its circuit, or its Supreme Court. The Senate will notice that by the terms of the Constitution the appellate jurisdiction from the district and circuit courts is limited to the cases in law and equity and the other cases named in the Constitution, none of which embrace a case of impeachment.

There is, therefore, senators, no room for invoking the decision of the Supreme Court of the United States upon any question touching the liability of the President to answer upon impeachment by the people's representatives at the bar of the Senate. What excuse, therefore, I ask, is there for the pretence that the President may set aside and dispense with the execution of the laws, all or any of them, enacted by the Congress under the pretext of defending the Constitution by invoking a judicial inquiry in the courts of the United States.

Be it known, senators, that but two questions, which by possibility could

become the subject of judicial decision, have been raised by the learned and astute counsel who have attempted to make this defence. The first is that the heads of departments are the mere registering secretaries of the President of the United States, and are bound to recognize his will as their sworn duty. I deny that proposition; and I think that the learned gentleman from New York did well, remarkably well, as he does everything well, to quote in advance for our instruction, when we should come to reply to him upon this point, those divine words of the great Apostle to the Gentiles, wherein he speaks of charity as long patient and suffering. It required a charity, senators, broader than the charity of the Gospel, to sit patiently by and hear these gentlemen invoke the decision of the Supreme Court upon either of the questions involved in this issue, when we knew that these gentlemen, overflowing as they manifestly are with all learning, ancient and modern, the learning of the dead as well as the learning of the living, knew right well that the Supreme Court of the United States had solemnly decided both questions against them.

Now for the proof. As to the obligation of the heads of the departments to learn their duty under the law through the will of an Executive, the Senate will remember that the learned gentleman from New York handled the great case of Marbury *vs.* Madison with wondrous skill and dexterity. He took care, however, not to quote that part of the decision which absolutely settles this question as to the obligation of the secretaries to respond to the will of the Executive in questions of law; he took care not to quote it, and to keep it in the background. Perhaps, senators, he assumed that he knew all that the poor managers of the House knew about this case, and then he knew all that he knew besides, gathered from Tacitus, if you please, and from the philippics of Cicero against Cataline, and from that speech of his in defence of Milo, which it happens he never made until after poor Milo was convicted and banished, and was heard to cry out in the agony of his soul if he had made that speech for him on the trial, "I would not be to-day here in Marseilles eating mullets." [Laughter.]

I read now in the hearing of the Senate the decision of Chief Justice Marshall in the case of Marbury *vs.* Madison, touching this alleged obligation of the heads of departments to take the will of the Executive as their law. Marshall says on page 158 of 1 Cranch:

> It is the duty of the Secretary of State to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts in this respect, as has been very properly stated at the bar, under the authority of law and not by the instructions of the President.

If he should disobey the law, does it not logically result that the President's commands cannot excuse him; that the people might well depose him from his office whether the President willed it or not? It only illustrates the proposition with which I started out, that neither the President nor his Secretaries are above the Constitution or above the laws which the people enact.

As for the other proposition, senators, attempted to be set up here for this accused and guilty President, that he may with impunity, under the Constitution and laws of the United States, interpret the Constitution and sit in judicial judgment, as the gentleman from Massachusetts (Mr. Curtis) urged it, upon the validity of your laws, that question has also been ruled in the Supreme Court of the United States, and from that hour to this has never been challenged. Although an attempt was made to drag the illustrious name of the Chief Justice, who presides, under the Constitution, at this moment over this deliberative and judicial assembly, to their help, it was made in vain, as I shall show before I have done with this argument. I say that the position assumed for the President by all his counsel that he is to judicially interpret the Constitution for himself; that he is to judicially determine the validity of laws, and execute them or suspend them and dispense with their execution at his pleasure, and defy the power

Digitized by Google

of the people to bring him to trial and judgment, was settled against him thirty years ago by the Supreme Court of the United States, and that decision has never been questioned since by any authoritative writer upon your Constitution or by any subsequent decision in your tribunals of justice. I read, in the first place, the syllabus as collated by my reporter (Mr. Worthington) from the report itself, and then I will read the decision of the court. It is the case of Kendall *vs.* The United States, 12 Peters. In the syllabus it is stated that—

By an act for the relief of the relators in the case the Solicitor of the Treasury was directed to audit their claims for certain services, and the Postmaster General was directed to credit them with the sum thus found due. The Postmaster General upon the settlement of the claim by the Solicitor credited the relators with a part of the amount found due, but refused to credit them with the remainder. A *mandamus* was applied for and issued by the circuit court of the District, whereupon the Postmaster General brought the case before the Supreme Court by a writ of error.

Upon the hearing of that case in the Supreme Court, Justice Thompson pronounced the united judgment of the court as follows:

It was urged at the bar that the Postmaster General was alone subject to the direction and control of the President with respect to the execution of the duty imposed upon him by this law; and this right of the President is claimed as growing out of the obligation imposed upon him by the Constitution to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a *dispensing power*, which has no countenance for its support in any part of the Constitution, and is asserting a principle which, if carried out in its results to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress and paralyze the administration of justice.

To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible. (12 Peters, p. 612.)

I ask you, senators, to consider whether I was not justifiable in saying that it was a tax upon one's patience to sit here and listen from day to day and from week to week to these learned arguments made in defence of the President, all resting upon his asserted executive prerogative to dispense with the execution of the laws and protect himself from trial and conviction before this tribunal, because he said that he only violated the laws in order to test their validity in the Supreme Court, when that court had already decided thirty years ago that any such assumed prerogative in the President enabled him to sweep away all the legislation of Congress and prevent the administration of justice itself, and found no countenance in the Constitution? I suppose, senators, that the learned ex-Attorney General thought that there was something here that might disturb the harmony and the order of their argument in this decision of Kendall *vs.* The United States, and so in his concluding argument for the accused he attempted to fortify against such consequences by calling to his aid the decision of the present Chief Justice in what is known as the Mississippi case. With all respect to the learned ex-Attorney General, and all his associates engaged in this trial, I take it upon me to say that the decision pronounced by his honor the Chief Justice of the United States in the Mississippi case has no more to do with the question involved in this controversy than has the Koran of Mohammed, and the gentleman was utterly inexcusable in attempting to force that decision into this case in aid of any such proposition as that involved in this controversy, and made, as I shall show before I have done with it, directly by the President himself in his answer, as well as by his retained counsel.

What did his honor the Chief Justice decide in the Mississippi case? Nothing in the world but this, as is well known to every lawyer in America, even to every student of the law versed not beyond the hornbooks of his profession, that where the law vested the President with discretionary power, his judgment in the exercise of his discretion, under the law, until that judgment was overruled by the legislative power of the nation, concluded all parties. We agree to that. The learned senator from New York, who honors me with his attention, [M

Digitized by Google

Conkling,] knows that before he was born that question was decided precisely in the same way in the great State which he so honorably represents here to-day, and is reported in 12 Wheaton; but it does not touch this question at all, and the proposition is so foreign to the question that it is like one of those suggestions referred to by Webster upon one occasion, when he said to make it to a right-minded man is to insult his intelligence. I read, however, from the opinion of the Chief Justice, and in reading from it I wish to be understood that I agree with every word and letter and syllable which the Chief Justice uttered; but it does not touch this question. The Attorney General, in citing, prefaced it with these words:

It is sufficient upon this point to cite a late opinion of the Supreme Court of the United States, in what is called the Mississippi injunction case, decided April, 1867. Mr. Chief Justice Chase, delivering the opinion of the court, says:

"It is assumed by the counsel for the State of Mississippi that the President in the execution of the reconstruction acts is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import. A ministerial duty, the performance of which may, in proper cases, be required of a head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, or imposed by law."

After citing some cases of merely ministerial duty, the Chief Justice proceeds as follows:

In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single, specific act, and that performance, it was held, might be required by *mandamus*. Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among the laws the acts named in the bill.

What acts? The reconstruction act, that vested him with a very large discretion to the hurt of the nation:

The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political. An attempt on the part of the judicial department of the government to enjoin the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as an "absurd and excessive extravagance." It is true that, in the instance before us, the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principle which forbids judicial interference with the exercise of executive discretion.

What on earth has that to do with the question in issue here? I may have occasion, senators, and you will pardon me if I avail myself of the opportunity, to say that the tenure-of-office law which is called in question here this day leaves no discretion whatever in the Executive, as to removals or suspensions during the session of the Senate, and, in the language of his honor the Chief Justice, imposed upon him a plain unequivocal duty, about which he was not even mistaken himself. I count myself, therefore, justified, even at this stage of my argument, in reiterating my assertion that the decision in the Mississippi case has nothing whatever to do with the principle involved in this controversy, and that the President has no excuse whatever for attempting to interfere with and set aside the plain mandates and requirements of the law. There was no discretion left in him whatever; and even his counsel had not the audacity to argue here before the Senate that the act of 1867 which is called in question by this Executive, who has violated its provisions, dispensed with its execution, and defied its authority, left any discretion in him. The point they make is that it is unconstitutional and no law; and that is the very point settled in Kendall *vs.* The United States, that the power vested in the President "to take care that the laws be faithfully executed" vests in him no power to set aside a law of the United States, and to direct the head of a department to disobey it, and authorize the head of the department to plead his royal mandate in a court of justice in excuse and justification of his refusal to obey the plain requirement of

the law. It is written in the Constitution that "he shall take care that t laws be faithfully executed." Are we to mutilate the Constitution, and for t benefit of the accused to interpolate into the Constitution a word which is n there and the introduction of which would annihilate the whole system; that to say, that "the President shall take care that the laws which he approves, a only the laws which he approves, shall be faithfully executed?" This is last the position assumed for the President by himself in his answer, an assumed for him by his counsel in his defence; and the assumption conflic with all that I have already read from the Constitution, with all that I ha already read of its judicial interpretation and construction; and it conflicts well with all that remains of the instrument itself. It is useless to multip words to make plain a self-evident proposition; it is useless to attempt to imp this power in the President to set aside and dispense with the execution the laws in the face of the express words of the Constitution, that "all le islative power granted by this Constitution shall be vested in a Congress whic shall consist of a Senate and a House of Representatives," that he shall be swor "faithfully to execute the office of President," and therefore faithfully to di charge every obligation which the Constitution enjoins, first and foremost which obligations is thus written on the very fore-front of the instrument, tha he shall take care that the laws enacted by the people's representatives in Con gress assembled shall be faithfully executed—not some of the laws; not th laws which he approves; but the laws shall be executed until the same sha have been duly repealed by the power that made them, or shall have been con stitutionally reversed by the Supreme Court of the United States acting withi the limitations and under the restrictions of the Constitution itself.

We have heard much, senators, in the progress of this discussion, about th established custom of the people of this country; we have heard much about th long-continued practice of eighty years under the Constitution and laws of th United States. You have listened in vain, senators, for a single citation of single instance in the history of the republic where there was an open violatio of the written law of this land, either by the Executive, by States, or by com binations of men, which the people did not crush at the outset and put down That is a fact in our history creditable to the American people, and a fact tha ought to be considered by the Senate when they come to sit in judgment upo this case now made before them for the first time under the Constitution of th United States, whether the President is above the laws and can dispense wit their execution with impunity in the exercise of what is adroitly called his judi cial power of interpretation.

I need not remind senators of that fact in our early history, when, by insurrection, a certain act was attempted to be resisted in the State of Pennsyl vania, when Washington promptly took measures to crush this first uprising o insurrection against the supremacy of the laws. The gentlemen have attempte to summon to their aid the great name of the hero of New Orleans. It is fres within the recollection of senators, as it is fresh within the recollection of million of the people of this country, that when the State of South Carolina, in the exer cise of what she called her sovereign power as a State, by ordinance attempte to set aside the laws of the United States for the collection of customs, th President of the United States, Andrew Jackson, not unmindful of his oa h— although the law was distasteful to him, and it is a fact that has passe into history that he even doubted its constitutionality—yet, nevertheless, issue hi proclamation to the insurgents, and, lifting his hand, swore "by the Eterna th Union must and shall be preserved." There was no recognition here of th right either in himself or in a State to set aside the laws.

Gentlemen, there is a case still fresher within the recollection of senator and still fresher in the recollection of the people of this country, that attest more significantly than any other the determination of the people to abide b

Digitized by Google

their laws enacted by their Congress, whatever the law may be and however odious it may be. The gentleman from New York—else I might not have alluded to it in this discussion—took occasion to refer to the fugitive slave law of 1850; a law which was disgraceful, (and I say it with all respect to the Congress that enacted it;) a law which was in direct violation of the letter and the spirit of the Constitution; a law of which I can say, at least, although I doubt much whether the gentleman from New York can say as much, that it never found an advocate in me; a law of which Webster spoke when he said, "My judgment always was, and that is my opinion to-day, that it is unwarranted by the Constitution;" a law which offered a bribe out of the common treasury of the nation to every magistrate who sat in judgment upon the right of a flying bondman to that liberty which was his by virtue of the same creative energy which breathed into his nostrils the breath of life and he became a living soul; a law which offered a reward to the ministers of justice to shorten the judgment of the poor; a law which, smiting the conscience of the American people and the conscience of the civilized world, made it a crime to give shelter to the houseless and, in obedience to the utterances of our divine Master, to give a cup of water to him that was ready to perish; a law enacted for the purpose of sustaining that crime of crimes, that sum of all villanies, which made merchandise of immortality, which transformed a man into a chattel, a thing of trade, which, for want of a better word, we call a slave, with no acknowledged rights in the present, with no hope of a heritage in the great hereafter, to whose darkened soul, under this crushing bondage, the universe was voiceless, and God himself seemed silent; a law under the direct operation of which that horrible tragedy was enacted, my good sir, [addressing Mr. Groesbeck,] within our own noble Commonwealth, in the streets of your beautiful city, (Cincinnati,) when Margaret Garnier, with her babe lashed upon her breast, pursued by the officers by virtue of this law, in her wild frenzy forgot her mother's affection in the joy she felt in sending, before its appointed time, by her own hand, the spotless spirit of her child to the God who gave it rather than to allow it to be tossed back into this hell of human bondage under the operation of American law; a law sustained by the American people even on that day when Anthony Burns walked in chains under the shadow of Bunker Hill, "where every sod 's a soldier's sepulchre," and where sleeps the first great martyr in the cause of American independence, to be tried by a magistrate in a temple of justice girdled itself with chains and guarded by bayonets; and yet the people stood by and said let the law be executed until it be repealed.

Gentlemen talk about the American people recognizing the right of any President to set aside the laws! Who does not know that two years after this enactment, in 1852, the terrible blasphemy was mouthed in Baltimore by the representatives of that same party that to-day insists upon the executive prerogative to set aside your laws and annihilate your government, touching this fugitive-slave law, that all discussion in Congress and out of Congress should be suppressed? When they passed that resolution they ought to have remembered that there is something stronger after all than the resolutions of mere partisans in convention assembled. They ought to have remembered that God is not in the earthquake or in the fire, but in "the still, small voice," speaking through the enlightened conscience of enlightened men, and that it is at last omnipotent. But I only refer to it: God knows that, for the honor of our country, I would take a step backward and cover the nakedness and shame of the American people in that day of America's dishonor. When that party passed that resolution they nominated their candidate, he accepted its terms; and he was carried to the presidential chair by the votes of all the States of this Union, except four, upon the basis that he would execute the laws, however odious they might be, however offensive they might be to the judgment and conscience of the people of the United States and of the civilized world.

Digitized by Google

And now, with such a record as this, these gentlemen dare to come before the Senate and tell the Senate that it is the traditional policy of the American people to allow their own laws to be defied by their own Executive. I deny it. There is not a line in your history but gives a flat denial to the assumption. It has never been done.

In this connection, senators, I feel constrained, although I deeply regret it, to be compelled to depart from the direct line of my argument to notice another point that was made by the gentleman in order to bolster up this assumption, made for the first time, as I insist, in our history, of the right of the Executive, by his executive prerogative, to suspend and dispense with the execution of the laws, and that was the reference which was made to your lamented and martyred President, Abraham Lincoln. In God's name, senators, was it not enough that he remembered in the darkest hours of your trial, and when the pillars of your holy temple trembled in the storm of battle, that oath which, in his own simple words, was "registered in heaven," and which he must obey on peril of his soul? Was it not enough that he kept his faith unto the end and finally laid down his life a beautiful sacrifice in defence of the republic and the laws, without slandering and calumniating his memory now that he is dead, that his tongue is mute, unable to speak for himself, by the bald, naked, and false assertion that he violated the laws of his country? I speak earnestly, I speak warmly on this subject, because the man thus slandered and outraged in the presence of the Senate and civilized world was not only my own personal friend, but he was the friend of our common country and our common humanity. I deny that, for a single moment, he was regardless of the obligations of his oath or of the requirements of the Constitution. I deny that he ever violated your laws. I deny that he ever assumed to himself the power claimed by this apostate President this day to suspend your laws and dispense with their execution. Though dead, he yet speaks from the grave; and I ask senators when they come to consider this accusation against their murdered President, to ponder upon the words of his first inaugural, when manifestly alluding to the fugitive slave law, which violated every conviction of his nature, from which he went back with abhorrence; he nevertheless in that inaugural said to the American people, however much we may dislike certain laws upon our statute-books, we are not at liberty to defy them, nor to disregard them, nor to set them aside; but we must await the action of the people and their repeal through the law-making power. I do not quote the exact words, but I quote the substance; I doubt not they are as familiar to the minds of senators as they are to me.

Oh, but, said the gentleman, he suspended the *habeas corpus* act. The gentleman was too learned not to know that it has been settled law from the earliest times to this hour that in the midst of arms the laws are silent, and that it is written in the Constitution that "the privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it." It was not Mr. Lincoln that suspended the *habeas corpus* act; it was that great public, solemn, civil war that covered your heavens with blackness and filled the habitations of your people with mourning and lamentation for their beautiful slain upon the high places of the land. Senators, the best answer that I can make to this assertion that your murdered President was responsible for what necessarily resulted from this atrocious and unmatched rebellion, I make in the words of that grand and noble man, than whom a purer, a wiser, or better spirit never ascended the chair of civil magistracy in this or in any country, in this age or in any age—I refer to John Quincy Adams—when he said that in the presence of public war, either domestic or foreign, all the limitations of your Constitution are silent, and in the event of insurrection in any of the States, all the institutions of the States within which it rages, to use his own terse, strong words, "go by the board." He said: "The war power is limited only by the law and usage of nations." You cannot prosecute war by a magistrate's warrant

and a constable's staff. Abraham Lincoln simply followed the accepted law of the civilized world in doing what he did. I answer further, for I leave no part of it unanswered, I would count myself dishonored, being able to speak here for him who cannot speak for himself, if I left any colorable excuse for this assault upon his character unanswered and unchallenged.

Why, say the gentlemen, you passed your indemnity acts. Now, who is there in this Senate of the United States so weak as not to know that it is in vain that you pass indemnity acts to protect the President of the United States, if, after all, his acts were unconstitutional—to the hurt of private right. You must go a step further than that; you must deny jurisdiction to the courts, you must shut the doors of your temple of justice, you must silence the ministers of the law before you pass an indemnity act which will protect him if his act at last be unconstitutional. That was not the purpose of the act. If the gentleman referred to the general indemnity act, I had the honor to draught it myself. I claim no particular credit for it. It is not unknown to the legislation of this country and of other countries. The Congress of the United States, as senators will remember, passed a similar act in 1862. The general act to which I refer was passed in 1867. That act was simply declaring that the acts of the President during the rebellion and of those acting for the President in the premises, should be a bar to prosecutions against them in the courts. What was the object of it? If it be in the power of the nation to defend itself, if it be constitutional to defend the Constitution, if it be constitutional for the President to summon the people to the defence of their own laws, and the defence of their own firesides, and the defence of their own nationality, the law said that this should be an authority to the courts to dismiss the proceeding, on the ground that the act was done under the order of the President. But how could we make his act valid under the Constitution, if it was unconstitutional, if the limitations of the Constitution operated? I do not stop to argue the question. It has been argued by wager of battle, and it has been settled beyond review in this tribunal, or in any tribunal, that the public safety is the highest law, and that it is a part and parcel of the Constitution of the United States.

I have answered, senators, and I trust I have answered sufficiently, all that has been said by the counsel for the President for the purpose of giving some colorable justification for the monstrous plea which they this day interpose for the first time in our history, that it pertains to the executive prerogative to interpret the Constitution judicially for himself and to determine judicially the validity of every law passed by Congress, and to execute it or suspend it, or dispense with its execution at his pleasure.

Mr. SHERMAN. If the honorable manager will pause at this point of the argument I will submit a motion that the Senate take a recess for fifteen minutes.

The motion was agreed to

At the expiration of the recess the Chief Justice resumed the chair and called the Senate to order.

Mr. Manager BINGHAM. Mr. President and Senators, the last words which I had the honor to utter in the presence of the Senate, were to the effect that I had endeavored to answer what had been said by the counsel for the accused in defence of the monstrous proposition made for the first time in the history of the republic, that the Executive may suspend and dispense with the execution of the people's laws, at his pleasure. I beg the pardon of the Senate for having forgotten to notice the very astute argument made by the learned counsel from New York [Mr. Evarts] in behalf of the President, touching the broker who refused to pay the license under your revenue laws, and under the advice of the learned counsel was finally protected in the courts. Senators, pardon me for saying again that the introduction of such an argument as that was an insult to the intelligence of the American Senate; it does not touch the question, and the man who does not understand that proposition is not fit to

stand in the presence of this tribunal and argue for a moment any issue involved in this controversy.

Nothing is more clearly settled, Senators—and I ought to ask pardon at every step I take in this argument for making such a statement to the Senate—nothing is more clearly settled under the American Constitution in all its interpretations than that the citizen upon whom the law operates is authorized by the Constitution to decline compliance without resistance, and appeal to the courts for his protection. That was the case of the New York broker to which the learned counsel referred; and desperate must be the defence of his client, if it hangs upon any such slender thread.

Who ever heard of that rule of universal application, in this country, of the right of the citizen peacefully, quietly, without resistance, without meditating resistance, to appeal to the courts against the oppression of the law, being applied to the sworn executor of the law? The learned gentleman from New York would have given us more light on this subject if he had informed us that the collector under your revenue law had dared, under a letter of authority of Andrew Johnson, to set aside a statute, and upon his own authority, coupled with that of his chief, to defy your power. The two questions are as distinct as life and death, as light and darkness, and no further word need be said by me to the American Senate in answer to that proposition.

I may be pardoned now, senators, for referring to other provisions of the Constitution which do sustain and make clear the position I assumed as the basis of my argument, that the letter of the law passed by the people's representatives in Congress assembled concludes the Executive. I have given you already the solemn decision of the Supreme Court of the United States upon that subject, unquestioned and unchallenged from that day to this. I now turn to a higher and a more commanding authority, the supreme law of the land ordained by the people and for the people, in which they have settled this question between the people and the Executive beyond the reach of a colorable doubt. I refer to the provisions of the Constitution which declare that—

> Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house it shall become a law. * * *
>
> If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

I ask the senators to please note in this controversy between the representatives of the people and the advocates of the President that it is there written in the Constitution so plainly that no mortal man can gainsay it, that every bill which shall have passed the Congress of the United States and been presented to the President and shall have received his signature shall be a law; that it further provides that every bill which he shall disapprove and return to the house in which it originated with his objections, if reconsidered and passed by the Congress of the United States by a two-thirds vote, shall become a law; and that every bill which shall have passed the Congress of the United States and shall have been presented to the President for his approval which he shall retain for more than ten days, Sundays excepted, during the session of Congress, shall be a law. That is the language of the Constitution; it shall be a law if he approves it; it shall be a law if he disapproves it and the Congress pass it over his veto; it shall be a law if he retain it for more than ten days during the session of Congress, Sundays excepted. In each such case it shall be a law. It is in vain, altogether in vain, against this bulwark of the Consti-

Digitized by Google

tution, that gentlemen come, not with their rifled ordnance, but with their small arms playing upon it, and telling the Senate of the United States and the people of the United States in the face of the plain words of the Constitution that it shall not be a law. The people meant precisely what they said, that it shall be a law; though the President give never so many reasons, by veto, why he deems it unconstitutional, nevertheless, if Congress by a two-thirds vote pass it over his veto, it shall be the law. That is the language of the Constitution.

What is their answer? "It is not to be a law unless in pursuance of the Constitution." An unconstitutional law, they say, is no law at all. We agree to that; but the executive—and that is the point in controversy here—is not the department of the government to determine that issue between the people and their representatives; and the man is inexcusable, absolutely inexcusable, who ever had the advantage of common schools and learned to read the plain text of his native vernacular, who dares to raise the issue in the light of the plain text of the Constitution that the President, in the face of the Constitution, is to say it shall not be a law, though the Constitution says expressly IT SHALL BE A LAW. I admit that when an enactment of Congress shall have been set aside by the constitutional authority of this country it thenceforward ceases to be law, and the President himself might well be protected for not thereafter recognizing it as law. I admit it, although gentlemen on that side of the chamber will pardon me—and surely I make the allusion for no disrespectful purpose whatever—I say it rather because it has been pressed into this controversy on the other side, in saying that it was the doctrine taught by him who is now called the great apostle of Democracy in America, that the Supreme Court of the United States could not decide the constitutionality of a law for any other department of this government; that they only decide for themselves and the suitors at their bar. For what earthly use the citation from Jefferson was introduced by the learned gentleman from Tennessee, (Mr. Nelson,) who first referred to it, and by the learned Attorney General, I cannot for the life of me comprehend in the light of the answer here interposed by the President. He tells you, Senators, by his answer that he only violated the law, he only asserted this executive prerogative, that would cost any crowned head in Europe this day his life, innocently for the purpose of taking the judgment of the Supreme Court; and here comes his learned advocate from Tennessee, and his learned advocate the Attorney General, quoting the opinion of Thomas Jefferson to show that at last the decision of the Supreme Court could not control him at all; that it could not decide any question for the departments of the government.

I am not disposed to cast reproach upon Mr. Jefferson. I know well that he was not one of the framers of the Constitution. I know well that he was not one of the builders of the fabric of American empire. While he contributed much to work out the emancipation of the American people from the control and domination of British rule and deserves well of his country, one of the authors of the Declaration of Independence, yet I know well enough that his opinions on that subject are not accepted at this day by the great body of the American people and find no place in the authoritative and commanding writers upon the text of your Constitution. He was a man, doubtless, of fine philosophic mind; he was a man of noble, patriotic impulses; he rendered great service to the country and deserves well of his countrymen; but he is not an authoritative exponent of the principles of your Constitution, and never was.

I may be pardoned further, in passing, for saying in connection with the citation that is made here, right in the face of the answer of the accused, that his only object in violating the law was to have a decision of the Supreme Court on the subject, that another distinguished man of the democratic party standing in his place in the Senate years ago, in the controversy about the constitutionality of the United States Bank, afterward lifted to the Presidency of the United

States, declared in his place here that while he should give a respectful consideration to the decision of the Supreme Court of the United States touching the constitutionality of an act of Congress, he should nevertheless as a senator upon his oath, hold himself not bound by it at all. That was Mr. Buchanan.

One thing is very certain: that these authorities quoted by the gentlemen do sustain in some sort, if it needed any support at all, the position that I have ventured to assume before the Senate, that upon all trials of impeachment presented by the House of Representatives the Senate of the United States is the highest judicial tribunal of the land, and is the exclusive judge of the law and fact, no matter what any court may have said touching any question involved in the issue.

Allow me, Senators, now to take one step further in this argument touching this position of the President, for I intend in every step I take to stand with the Constitution of my country, the obligations of which are upon me as a representative of the people. I have already in your hearing cited a text from the Constitution which ought to close this controversy between the people and the President as to his right to challenge a law which the Constitution declares is a law, and shall be a law despite his veto. The other provision of the Constitution to which I refer is that provision which defines and limits the executive power of the President. I refer again to the words of the Constitution:

The President shall be Commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States: he may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate shall appoint, embassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper, &c.

These are the specific powers conferred on the President by the Constitution. I shall have occasion hereafter in the course of this argument to take notice of that other provision which declares that the executive power shall be vested in a President. It is not a grant of power, however, I may be allowed to say in passing, to the President, and never was so held by anybody in this country. The provisions of the Constitution which I have read grant to the President of the United States no legislative nor judicial power. Both of these powers, legislative and judicial, are necessarily involved in the defence this day attempted to be set up by the Executive; first, in the words of his own counsel, that he may judicially interpret the Constitution for himself and judicially determine upon the validity of every enactment of Congress; and second, in the position assumed by himself, and for which he stands charged here at your bar as a criminal, to repeal—I use the word advisedly and considerately—to repeal by his own will and pleasure the laws enacted by the representatives of the people. This power of suspending the laws, of dispensing with their execution until such time as it may suit his pleasure to test their validity in the courts, is a repeal for the time being, and, if it be sustained by the Senate, may last during his natural life, if so be the American people should so long tolerate him in the office of Chief Magistrate of the nation. Why should I stop to

argue the question whether such a power as this, legislative and judicial, may be rightfully assumed by the President of the United States, under the Constitution, when that Constitution expressly declares that all legislative power granted by this Constitution shall be vested in Congress, and that all judicial power shall be vested in a Supreme Court and in such inferior courts as the Congress may by law establish, subject, nevertheless, to the limitations and definitions of power embraced in the Constitution itself? The assumption upon which the defence of the President rests, that he shall only execute such laws as he approves or deems constitutional, is an assumption which invests him with legislative and judicial power in direct contravention of the express words of the Constitution.

If the President may dispense with one act of Congress upon his own discretion, may he not in like manner dispense with every act of Congress? I ask you, Senators, whether this conclusion does not necessarily result, as necessarily as effect follows efficient cause? If not, pray why not? Is the Senate of the United States, in order to shelter this great criminal, to adopt the bold assumption of unrestricted executive prerogative, the wild and guilty fantasy that the king can do no wrong, and thereby clothe the Executive of the American people with power to suspend and dispense with the execution of their laws at his pleasure, to interpret their Constitution for himself, and thereby annihilate their government?

Senators, I have endeavored to open this question before you in its magnitude. I trust that I have succeeded. Be assured of one thing, that according to the best of my ability, in the presence of the representatives of the nation, I have not been unmindful of my oath; and I beg leave to say to you, Senators, this day, in all candor, that, in my judgment, no question of mightier import was ever before presented to the American Senate, and to say further, that no question of greater magnitude ever can come by possibility before the American Senate, or any question upon the decision of which greater interests necessarily depend.

In considering this great question of the power of the President by virtue of his executive office to suspend the laws and dispense with their execution, I pray you, Senators, consider that the Constitution of your country, essential to our national life, cannot exist without legislation duly enacted by the representatives of the people in Congress assembled and duly executed by their chosen Chief Magistrate. Courts, neither supreme nor inferior, for the administration of justice within the limitations of your Constitution, can exist without legislation. Is the Senate to be told that this department of the government, essential to the peace of the republic, essential to the administration of justice between man and man, those ministers of justice who, in the simple oath of the purer days of the republic, were sworn to do equal justice between the poor and the rich, shall not administer justice at all if perchance the President of the United States may choose, when the Congress comes to enact a law for the organization of the judiciary, and enact it even despite his objections to the contrary in accordance with the Constitution by a two-thirds vote, to declare that according to his judgment and his convictions it violates the Constitution of the country, and therefore it shall not be put into execution?

Senators, if he has the power to sit in judgment judicially—and I use the word of his advocate—upon the tenure-of-office act of 1867, he has like power to sit in judgment judicially upon every other act of Congress; and in the event of the President of the United States interfering with the execution of a judiciary act establishing for the first time, if you please, in your history, or for the second time, if you please, if by some strange intervention of Providence the existing judges should perish from the earth, I would like to know what becomes of this naked and bald pretence (unfit to be played with by children, much less by full-grown men) of the President, that he only violates the laws innocently

Digitized by Google

and harmlessly, to have the question decided in the courts, when he arrogates to himself the power to prevent any court sitting in judgment upon the question!

Representatives to the Congress of the United States cannot be chosen without legislation; first, the legislation of the Congress apportioning representation among the several States according to the whole number of representative population in each; and second, an enactment either of the Congress or of the legislatures of the several States fixing the time, place, and manner of holding the elections. Is it possible that the President of the United States, in the event of such legislation by the Congress, clearly authorized by the very terms of the Constitution, and essential to the very existence of the government, is permitted, in the exercise of his judicial executive authority, to sit in judgment upon your statute and say that it shall not be executed? This power given by your Constitution to the Congress to prescribe the time and place and manner of holding elections for representatives in Congress in the several States, and to alter as well the provisions of the State legislatures, in the words of one of the framers of the Constitution, was put into the instrument to enable the people through the national legislature to perpetuate the legislative department of their own government in the event of the defection of the State legislatures; and we are to be told here, and we are to deliberate upon it from day to day and from week to week, that the President of the United States is, by virtue of his executive office and his executive prerogative, clothed with the authority to determine the validity of your law and to suspend it and dispense with its execution at pleasure.

Again, a President of the United States to execute the laws of the people enacted by their representatives in Congress assembled, cannot be chosen without legislation. Are we again to be told that the President at every step is vested with authority to dispense with the execution of the law and to suspend its operation till he can have a decision, if you please, in the courts of justice! Revenue cannot be raised, in the words of the Constitution, to provide for the common defence and general welfare without legislation. Is the President to intervene with his executive prerogative to declare that your revenue laws do not meet his approval, and in the exercise of his independent co-ordinate power as one of the departments of this government if he chooses to suspend the law and dispense with its execution? If the President may set aside all laws and suspend their execution at pleasure, it results that he may annul the Constitution and annihilate the government, and that is the issue before the American Senate. I do not go outside of his answer to establish it, as I shall show before I have done with this controversy.

The Constitution itself, according to this assumption, is at his mercy, as well as the laws, and the people of the United States are to stand by and be mocked and derided in their own Capitol when, in accordance with the express provision of their Constitution, they bring him to the bar of the Senate to answer for such a crime than which none greater ever was committed since the day when the first crime was committed upon this planet as it sprung from the hand of the Creator; that crime which covered one manly brow with the ashy paleness and terrible beauty of death, and another with the damning blotch of fratricide! The people are not to be answered at this bar that it is in vain that they have put into the hands of their representatives the power to impeach such a malefactor, and by the express words of their Constitution they have put the power into the hands of the Senate, the exclusive power, the sole power to try him for his high crimes and misdemeanors.

The question touches the nation's life. Be it known, Senators, that your matchless constitution of government, the hope of the struggling friends of liberty in all lands, and for the perpetuity and the triumph of which millions of hands are lifted this day in silent prayer to the God of nations, can no more exist without laws duly enacted by the law-making power of the people than can the people themselves exist without air or without that bright heaven which

bends above us filled with the life-giving breath of the Almighty. A Constitution and laws which are not and cannot be enforced are dead. The vital principle of your Constitution and laws is that they shall be the supreme law of the land—supreme in every State, supreme in every Territory, supreme in every rood of the republic, supreme upon every deck covered by your flag, in every zone of the globe. And yet we are debating here to-day whether a man whose breath is in his nostrils, the mere servant of the people, may not suspend the execution both of the Constitution and of the laws at his pleasure, and defy the power of the people. The determination, Senators, of all these questions is involved in this issue, and it is for the Senate, and the Senate alone, to decide them and to decide them aright.

I have dwelt thus long upon this point because it underlies the whole question in issue here between the President and the people, and upon its determination the decision of the whole issue depends. If I am right in the position that the acts of Congress are law, binding upon the President and to be executed by him until repealed by Congress or actually reversed by the courts, it results that the wilful violation of such acts of Congress by the President, and the persistent refusal to execute them, is a high crime or misdemeanor, within the terms of the Constitution, for which he is impeachable, and of which, if he be guilty, he ought to be convicted and removed from the office that he has dishonored. It is not needful to inquire whether only crimes or misdemeanors specifically made such by the statutes of the United States are impeachable, because by the laws of the United States all crimes and misdemeanors at the common law, committed within the District of Columbia, are made indictable. I believe it is conceded on every hand that a crime or misdemeanor made indictable by the laws of the United States, when committed by an officer of the United States in his office, in violation of his sworn duty, is a high crime and misdemeanor within the meaning of the Constitution. At all events, if that be not accepted as a true and self-evident proposition by Senators, it would be in vain that I should argue further with them. And I might as well expect to kindle life under the ribs of death as to persuade a Senate, so lost to every sense of duty and to the voice of reason itself, which comes to the conclusion that after all it is not a high crime and misdemeanor under the Constitution for a President of the United States deliberately and purposely, in violation of his oath, in violation of the plain letter of the Constitution that he shall take care that the laws be faithfully executed, to set aside the laws and defiantly declare that he will not execute them.

Senators, I refer in passing, without stopping to read the statute, for I believe it was read by my associate, [Mr. Manager Boutwell,] to the act of February 27, 1801, (2 Statutes at Large, 103, 104,) which declares that the common law as it existed in Maryland at the date of the cession shall be in force in this District. I refer also to 4 Statutes at Large, page 450, section 15, which declares that all crimes and offences not therein specifically provided for shall be punished as theretofore provided, referring to the act of 1801. I refer also to 12 Statutes at Large, page 763, section 3, which confers jurisdiction to try all these offences upon the courts of the District.

That common-law offences are indictable in the District has been settled by the courts of the District and by the Supreme Court. In the United States *vs.* Watkins, 3 Cranch, the circuit court of the District ruled:

> In regard to offences committed within this part of the District the United States have a criminal common-law and the court has criminal common-law jurisdiction.

And in the case of the United States *vs.* Kendall, before referred to in 12 Peters, 614, the court ruled:

> That the common law as it was in force in Maryland when the cession was made remained in force in the District.

It is clear that the offences charged in the articles, if committed in the Dis-

Digitized by Google

trict of Columbia, would be indictable, for at the common law an indictment lies for all misdemeanors of a public evil example, for neglecting duties imposed by law, and for offences against common decency; 4 Bacon's Abridgment, page 302, letter E.

This is all, Senators, that I deem it important at present to say upon the impeachable character of the offences specified in the articles against the President, further than to remark that although the question does not arise upon this trial for the reasons already stated, a crime or misdemeanor committed by a civil officer of the United States, not indictable by our own laws or by any laws, has never yet been decided not to be impeachable under the Constitution of the United States; nor can that question ever be decided save by the Senate of the United States. I do not propose to waste words, if the Senate please, in noticing what, but for the respect I bear him, I would call the mere lawyer's *quirk* of the learned counsel from Massachusetts upon the defence, [Mr. Curtis,] that even if the President be guilty of the crimes laid to his charge in the articles presented by the House of Representatives, they are not high crimes and misdemeanors within the meaning of the Constitution, because they are not kindred to the great crimes of treason and bribery. It is enough, Senators, for me to remind you of what I have already said, that they are crimes which touch the nation's life, which touch the stability of your institutions; they are crimes which, if tolerated by this highest judicial tribunal in the land, vest the President by solemn judgment with the power under the Constitution to suspend at pleasure all the laws upon your statute-book, and thereby overturn your government. They have heretofore been held crimes, and crimes of such magnitude that they have cost the perpetrators their lives—not simply their offices, but their lives Of this I may have more to say hereafter.

But I return to my proposition. The defence of the President is not whether indictable crimes or offences are laid to his charge, but it rests upon the broad proposition, as already said, that impeachment will not lie against him for any violation of the Constitution and laws because of his asserted constitutional right to judicially interpret every provision of the Constitution for himself, and also to interpret for himself the validity of every law and execute or disregard upon his election any provision of either the Constitution or the laws, especially if he declare at or after the fact that his only purpose in violating the one or the other was to have a true construction of the Constitution in the one case, and a judicial determination of the validity of the law in the other, in the courts of the United States.

That I do not state this as the position of the President too strongly, I pray senators to notice what I now say, for I would count myself a dishonored man if purposely here or elsewhere I should misrepresent the position assumed by the President. The counsel for the President [Mr. Curtis] in his opening attempts to gainsay the statement as I have just made it, that the defence of the President rests upon the assumption as stated in his answer. The counsel, in the opening, states that—I quote his words from page 382, and they were qualified by none of his associates who followed him; the statement was considerately made; he meant precisely what he said, as follows:

> But when, senators, the question arises whether a particular law has cut off a power confided to him (the President) by the people through the Constitution, and he alone can raise that question, and he alone can cause a judicial decision to come between the two branches of the government to say which of them is right, and after due deliberation, with the advice of those who are his proper advisers, he settles down firmly upon the opinion that such is the character of the law—

That is to say, that it is unconstitutional, that it cuts off a power confided to him by the people—

> it remains to be decided by you whether there is any violation of his duty when he takes the needful steps to raise that question and have it peacefully decided in the courts.

Digitized by Google

I ask, Senators, in all candor, if the President of the United States, by force of the Constitution, as the learned counsel argue, is vested with judicial authority thus to interpret the Constitution and decide upon the validity of any law of Congress upon this statement of counsel, as I have just read it from the report now before you and upon your tables, what is there to hinder the President from saying this of every law of the land; that it cuts off some power confided to him by the people?

Senators, the learned gentleman from Massachusetts was too self-poised; he is, manifestly, too profound a man to launch out upon this wild, stormy sea of anarchy, careless of all consequences, in the manner in which some of his associates did. You may remember—and I quote it only from memory, but it is burned into my brain, and will only perish with my life—you remember the utterance of the gentleman from New York, not so careful of his words, who before you said, in the progress of his argument, that the Constitution had invested the President with the power to guard the people's rights against congressional encroachments. You remember that as he progressed in his argument he ventured upon the further assertion in the presence of the Senate of the United States—and so you will find it written, doubtless, in the report—that if you dared to decide against the President upon this issue, the question would be raised before the people under the banner of the Supremacy of the Constitution in defence of the President upon the one side, and the Omnipotence of Congress upon the other; the Supremacy of the Constitution would be the sign under which the President was to conquer against the Omnipotence of Congress to bind him by laws enacted by themselves in the mode prescribed by the Constitution

Senators, I may be pardoned for summoning the learned counsel from Massachusetts as a witness against the assumption of his client, and against the assumption of his associate counsel, touching this power of the President to dispense with the execution of the laws. In 1862 there was a pamphlet issued bearing the name of the learned gentleman from Massachusetts, touching the limitations upon executive power imposed by the Constitution. I read from that pamphlet, and pledge myself to produce the original, so that it may be inspected by the Senate. I regret that my reporter has not brought it into the court. It shows the difference between the current of a learned man's thoughts when he speaks for the people, and according to his own convictions, and the thoughts of the same learned man when he speaks for a retainer:

"*Executive Power,*" *by B. R. Curtis: Cambridge*, 1862.

Dedicated—To all persons who have sworn to support the Constitution of the United States, and to all citizens who value the principles of civil liberty which that Constitution embodies, and for the preservation of which it is our only security, these pages are respectfully dedicated, by THE AUTHOR.

The President is the commander-in-chief of the army and navy, not only by force of the Constitution, but under and subject to the Constitution, and to every restriction therein contained, and to every law enacted by its authority, as completely and clearly as the private in the ranks. *He is general-in-chief, but can a general-in-chief disobey any law of his own country? When he can he superadds to his rights as commander the powers of a usurper, and that is military despotism; * * * * the mere authority to command an army is not an authority to disobey the laws of the country.*

The President has only executive power, not legislative, not judicial. The learned counsel has learned that word "judicial" after he entered upon the defence of the President. I may be pardoned in saying that I lay nothing to his charge in this. He bore himself bravely and well in the presence of this tribunal. He discharged his duty and his whole duty to his client. If he has even changed his mind he had a right to change it in the interests of his client; but I have a right to have him bear witness in the interests of the people and in support of the Constitution of my country. I therefore read further from him:

Besides all the powers of the President are executive merely. He cannot make a law.

He cannot repeal one. He can only execute the laws. He can neither make nor suspend nor alter them. He cannot even make an article of war.

That is good law. It was not good law in the midst of the rebellion, but it is good law, nevertheless, under the Constitution, in the light of the interpretation given to it by that great man, Mr. John Quincy Adams, whom I before cited. When the limitations of the Constitution are operative, when the whole land is covered with the serene light of peace, when every human being, citizen and stranger, within your gates is under the shelter of the limitations of the Constitution, it is the very law and nothing but the law.

Now, Senators, that this alleged judicial executive power of the President to suspend at his discretion all the laws upon your statute-book and to dispense with their execution is the defence and the whole defence of this President seems to me clear—clear as that light of heaven in which we live, and so clear, whatever may be the decision of this tribunal, that it will be apparent to the judgment of the American people. It cannot be otherwise. It is written in his answer. It is written in the arguments of his counsel printed and laid upon your tables. No mortal man can evade it. It is all there is of it; and to establish this assertion, I ask senators to consider what article the President has denied? Not one. I ask the Senate to consider what offence charged against him in the articles of the House of Representatives he has not openly by his answer confessed or is not clearly established by the proof? Not one. Who can doubt that while the Senate was in session the President, in direct violation of the express requirement of the law, which, in the language of his honor, the Chief Justice, in the Mississippi case, left no discretion in him, enjoined a special duty on him, did purposely, deliberately, violate the law and defy its authority, in that he issued an order for the removal of the Secretary for the Department of War and issued a letter of authority for the appointment of a successor, the Senate being in session and not consulted in the premises? The order and the letter of authority are written witnesses of the guilt of the accused. They are confessions of record. There is no escape from them.

If this order is a clear violation of the tenure-of-office act; if the letter of authority is also a clear violation of the tenure-of-office act; the President is manifestly guilty, in manner and form, as he stands charged in the first, the second, the third, the eighth, and the eleventh articles of impeachment; and no man can gainsay it, except a man who accepts as law the assumption of his answer that it is his executive prerogative judicially to interpret the Constitution for himself; to set aside, to violate, and to defy the law when it vests no discretion in him whatever, and challenge the people to bring him to trial and judgment.

Senators, on this question of the magnitude and character of these offences charged against the President I shall be permitted, inasmuch as the counsel from New York thought it important to refer to it, to ask your attention to what was ruled and settled, and I think well settled, on the trial of Judge Peck. The counsel took occasion to quote, as you may remember, a certain statement from the record of that trial, but took especial pains to avoid any statement of what was actually settled by it. I choose to have the whole of the authority. If the gentleman insists upon the law in this case, I insist upon all the forms and upon all its provisions. In the trial of Peck, from which I read on page 427, Mr. Buchanan, chairman of the managers on the part of the House of Representatives, made the statement that—

An impeachable violation of law may consist in the abuse as well as in the usurpation of authority.

Subject, if you please, to the limitations of your own law that the abuse and the usurpation, as is clearly the fact here in the capital, are indictable. I venture to say, senators, if you look carefully through that record you will find none of the learned gentlemen who appeared in behalf of Judge Peck question-

Digitized by Google

ing for a moment the correctness of the proposition. The learned and accomplished and lamented ex-Attorney General of the United States, Mr. Wirt, who appeared on that trial, admitted it. There seemed to have been no question in the Senate upon the subject against it. I think Mr. Buchanan was most happy in his statement of the law in declaring that it may consist in an abuse of power and may consist in a usurpation of authority. For the purposes of this case I think it capable of the clearest demonstration that this is the rule which ought to govern its decision, inasmuch as all the offences charged, when committed within the District, as already shown, are indictable.

It is conceded that there is a partial exception to this rule, and that exception furnishes all the law which has appeared in this case, so far as I have been able to discover, in the defence of the Executive. It is an exception, however, made exclusively in the interests of judicial officers. The rule is well stated in 5 Johnson, 291, by Chancellor Kent, in the case of Yates *vs.* Lansing. I read from that authority:

> Judicial exercise of power is imposed upon the courts, and they must decide and act according to their judgment, and therefore the law will protect them.

He adds:

> The doctrine which holds a judge exempt from a civil suit or indictment for any act done or omitted to be done by him sitting as judge has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions in the English courts amid every change of policy and through every revolution of their government.

A judge manifestly, upon his authority, acting within his general authority, cannot be held to answer for an error of judgment. He would only be impeachable, however erroneous his judgment might be, for an abuse, for a usurpation of authority great in itself, and it must be specially averred, and must be proved as averred. No such rule ever was held to apply, since the courts first sat at Westminster, to an executive officer. It is an exception running through all the law in favor of judicial officers. A mere executive officer clothed with no judicial authority would be guilty of usurpation without the averment of usurpation. I beg to say that it has never been averred, or held necessary if averred, in any authoritative case against any executive officer whatever. An error of judgment would not excuse him. I refer to the general rule of law on this subject as stated by Sedgwick in his work on statutory and constitutional law, in which he says:

> Good faith is no excuse for the violation of statutes. Ignorance of the law cannot be set up in defence, and this rule holds good in civil as well as in criminal cases. (1 Sedgwick, 100.)

Mr. CONNESS. Mr. President, I should like to ask the manager whether he feels able to go on further to-day or not? I make the suggestion to him.

Mr. Manager BINGHAM. I am at the pleasure of the Senate. I will be able to proceed, if it be the pleasure of the Senate, for half an hour or so more with this argument; but I abide the pleasure of the Senate, and will defer to whatever may be their wishes about it.

Several SENATORS. Go on! Go on!

Mr. Manager BINGHAM. Senators, at this point of the argument the gentleman from New York, speaking for the President, knowing that the rule as I have read it from Sedgwick is the rule of universal application to executive officers and to all officers save judicial officers, that ignorance of the law can never be interposed as an excuse either in civil or criminal proceedings for the deliberate violation of the law, entered upon a wonderful adventure when he undertook to tell the Senate of the United States—I really thought it was a slip of the tongue, for I have great respect for his learning, and I could not but think he knew better—but he intimated that this rule, which holds the violater of law answerable and necessarily implies the guilty purpose and the guilty intent from

the fact of its violation, was a rule that was restricted to offences *malà in se*. The gentleman ought to have known when he made that utterance that the highest writer upon the law in America, and second to no writer upon the law who writes in the English language in any country, has truly recorded in his great commentaries upon the laws that the distinction between *mala prohibita* and *mala in se* is long ago exploded, and the same rule applies to the one as to the other. I refer to 1 Kent's Commentaries, page 529, and really I cannot see why it should not be so. I doubt very much whether it is within the compass of the mind of any senator within the hearing of my voice to say it should not be so. Chancellor Kent says upon that subject, page 529:

> The distinction between statutory offences which are *mala prohibita* only, or *mala in se*, is now exploded, and a breach of the statute law in either case is equally unlawful and equally a breach of duty.

The Senate will remember the very curious and ingenious use that the gentleman attempted to make of this statement of his, and that was that it cannot be possible that you are to hold these acts of the President criminal by force of the act of 1801 which, by relation simply, makes common-law offences indictable and crimes within the District of Columbia; that was not the only use, but that was a part of it and he went on to say to the Senate further that he could not see the force of the remark made by my colleague, [Mr. Boutwell,] that the President of the United States in this letter of authority by the appointment *ad interim* of Lorenzo Thomas in the presence of the Senate, during its session, without its advice and consent, twelve days after the expiration of the six months limited by the provisions of the act of 1795, could be held a criminal act. The defence of the President in some sort rested on the provisions of that law which authorized him to supply a vacancy in the several departments for a period not exceeding six months. Well, I will try to explain it here, if I may be pardoned, in case I should happen to refer to it again in the progress of my argument.

It is explained by this simple word, that the act of 1795, under which he attempts in his distress to shelter himself, says that no one vacancy shall be so supplied for a longer period than six months; he did supply it, according to the very words of his answer, for he tells you he made a vacancy indefinitely when he suspended Edwin M. Stanton, Secretary of War; he says in his answer it was an indefinite suspension, not simply for six months, but during the time he might occupy the executive power in this country. He indefinitely suspended him, he says, under the Constitution and laws; and he tells you further, in the same answer, that under the act of 1795 he supplied the vacancy. That act told him he should not supply it for a longer period than six months, unless it results that at the end of every six months he may supply it again and the statute thereby be repealed, supply it to the end of the time allotted him under the Constitution to execute the office of President of the United States. I would like some senator, in your deliberations, to make answer to that suggestion and see how it can be got rid of. He makes a vacancy indefinitely; he appoints General Grant Secretary of War *ad interim;* at the end of six months, and twelve days after the expiration of six months, in utter defiance of the law of 1795, he makes another appointment; and at the end of that six months and twelve days after, if you please, in further defiance of it, he makes another, and so on until the end of the time during which he may exercise the office of President, while the law itself expressly declares that no vacancy shall be so supplied for a longer period than six months. I think the gentleman from New York could have seen it but for the interest he felt in the fate of his client. That is my impression, and everybody else can see it in this country.

But it has been further said, by way of illustration and answer to all this, said by the counsel for the President, "Suppose the Congress of the United States should enact a law in clear violation of the express power conferred upon

the President, as, for example, a law declaring that he shall not be Commander-in-chief of the army, a law declaring that he shall not exercise the pardoning power in any case whatever, is not the President to intervene and protect the Constitution?" I answer, no; not by repealing the laws. The President is not to intervene and protect the Constitution against the laws. The people of the United States are the guardians of their own honor, the protectors of their own Constitution; and if there be anything in that Constitution more clearly written and defined and established than another, it is the express and clear provision that the legislative department of this government is responsible to no power on earth for the exercise of their legislative authority and the discharge of their duties during the sessions of the Congress save to the people that appointed them. It is a new doctrine altogether that the Constitution is exclusively in the keeping of the President. When that day comes, Senators, that the Constitution of your country, so essential to your national existence, and so essential to the peace, the happiness, and the prosperity of the people, rests exclusively upon the fidelity and patriotism and integrity of Andrew Johnson, may God save the Constitution and save the republic from its defender! No, sirs, there is no such power vested in the President of the United States. It is only coming back to the old proposition.

Why, say the gentlemen, surely it would be unconstitutional for Congress so to legislate. Agreed, agreed; I admit that it would be not only unconstitutional, but it would be criminal. But the question is, before what tribunal is the Congress to answer? Only before the tribunal of the people. Admit that they did it corruptly; admit that they did it upon a bribe; and yet every man at all conversant with the Constitution of the country knows well that it is written in that instrument that members of Congress shall not be held to answer in any other place, or before any body whatever, for their official conduct in Congress assembled, save to their respective houses. That is the end of it. They answer to the people, and the people alone can apply the remedy, and, of course, ought to apply it. You cannot make them answer in the courts. You have had it ruled that you cannot try them by impeachment, and, of course, when a majority vote that way in each house, you can hardly expect to expel them. Their only responsibility is to the people, and the people alone have the right to challenge them. That is precisely what the people have written in the Constitution, and every man so understands it.

Why, senators, I may make another remark which shows here the utter fallacy of any such position as that interposed by the counsel, and that is, that the Congress which would be so lost to all sense of justice and duty as to take away the pardoning power from the Executive in any case whatever have it in their power to take away any appeal to the courts of justice in the United States upon that question, so that there would be an end of it, and there would be no remedy but with the people, unless, indeed, the President is to take up arms to set aside the laws of the Congress of the United States. The Constitution of your country is no such weak or wicked invention.

Having disposed of this proposition, Senators, the next inquiry to be considered before the Senate, and to which I will direct their attention, is, has the President power, under the Constitution, to remove the heads of departments and fill vacancies so created, during the session of the Senate of the United States, without its consent, without and against the express authority of law? If he has not this power, he is confessedly guilty as charged. If he has, of course he ought to go acquitted as charged in the first, second, and third articles.

Mr. CONNESS. I move that the Senate, sitting as a court, adjourn until to-morrow.

Mr. Manager BINGHAM. I shall be very glad, indeed, for that courtesy.

The motion was agreed to; and the Senate, sitting for the trial of the impeachment, adjourned.

Digitized by Google

TUESDAY, *May* 5, 1868.

The Chief Justice of the United States took the chair.

The usual proclamation having been made by the Sergeant-at-arms,

The managers of the impeachment on the part of the House of Representatives and Messrs. Evarts, Groesbeck, and Nelson, of counsel for the respondent, appeared and took the seats assigned to them respectively.

The members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

The journal of yesterday's proceedings of the Senate, sitting for the trial of the impeachment, was read.

The CHIEF JUSTICE. Mr. Manager Bingham will proceed with the argument in behalf of the House of Representatives.

Mr. Manager BINGHAM. Mr. President and Senators, I would do injustice, senators, to myself; I would do injustice to the people whom I represent at this bar, if I were not to acknowledge, as I do now, my indebtedness to honorable senators for the attention which they gave me yesterday while I attempted to demonstrate to the Senate, in behalf of the people of the United States, that no man in office or out of office is above the Constitution or above the laws; that all are bound to obey the laws; that the President of the United States, above all other officials in this country, is bound to take care that the laws be faithfully executed; and especially that the suspending power and the dispensing power asserted by the President endangers the existence of the Constitution, is a violation of the rights of the people, and cannot for a moment be tolerated.

When I had the honor to close my remarks yesterday, I stated to the Senate that their inquiry would be directed first to the question whether the President has the power under the Constitution to remove the heads of departments and fill vacancies so created by himself during the session of the Senate in the absence of an express authority of law authorizing him so to do. If the President has not this power, he is confessedly guilty, as charged in the first, second, third, eighth, and eleventh articles; unless, indeed, the Senate is to come to the conclusion that it is no crime in the President of the United States deliberately and purposely and defiantly to violate the express letter of the Constitution of the United States and the express prohibition of the statutes of the Congress. I have said that the act was criminal if it was done deliberately and purposely. What answer has been made to this, senators? That the allegation is found in these articles of the criminal intent; and learned counsel have stood here before the Senate arguing from hour to hour and from day to day to show that a criminal intent is to be proved. I deny it. I deny that there is any authority which justifies any such statement. The law declares, and has declared for centuries, that any act done deliberately in violation of the law; that is to say, any unlawful act done by any person of sound mind and understanding, and responsible for his acts, necessarily implies that the party doing it intended the necessary consequences of his own act. I make no apology, senators, for the insertion of the word "intent" in the articles. I do not treat it as surplusage. It was not needful; but I make no apology for it. It is found in every indictment; and who ever heard of a court where the rules are applied with more strictness than they can be expected to be applied by the Senate of the United States, demanding of the prosecutor, in any instance whatever, that he should offer testimony of the criminal intent specially averred in the indictment, when he had proved that the act was done and the act done was unlawful? It is a rule, a rule not to be challenged here or elsewhere among intelligent men, that every person, whether in office or out of office, who commits an unlawful act made criminal by the very terms of the statute of the country within which he

Digitized by Google

lives and to the jurisdiction of which he is subject, intends all that is involved in the doing of the act, and the intent laid, therefore, is established. No proof is required. Why? To require it would simply defeat the ends of justice.

Who is able to penetrate the human intellect, to follow it to its secret and hidden recesses in the brain or heart of man, and bear witness of that which it meditates and which it purposes? Men, intelligent men, and especially the ministers of justice, judge of men's purposes by their acts, and necessarily hold that they intend exactly that which they do; and it is for them, not for their accusers, to show that they did it by misadventure, to show that they did it under a temporary delirium of the intellect, by which in the providence of God they were for the time being deprived of the power of knowing their duty and of doing their duty under the law.

Senators, upon a memorable occasion not unlike this which to-day attracts the attention of the Senate, and attracts the attention of the people of the United States, and attracts the attention of the civilized world, the same question was raised before the tribunal of the people whether intent was to be established, and one of those men on that occasion, when Earl Strafford knelt before the assembled majesty of England, arose in his place and answered that question in words so clear and strong that they ought to satisfy the judgment and satisfy the conscience of every senator. I read the words of Pym on the trial of Strafford, as to the intent:

> Another excuse is this, that whatsoever he hath spoken was out of good intention. Sometimes, my lords, good and evil, truth and falsehood, lie so near together that they are hardly to be distinguished. Matters hurtful and dangerous may be accompanied with such circumstances as may make them appear useful and convenient; and, in all such cases, good intention will justify evil counsel; but where the matters propounded are evil in their own nature, such as the matters are wherewith the Earl of Strafford is charged—as to break a public faith, and subvert laws and government—they can never be justified by any intentions, how good soever they be pretended.

Is there no endeavor here "to break public faith?" Is there no endeavor here "to subvert laws and government?" I leave senators to answer that question upon their own consciences and upon their oaths.

On this subject of intent I might illustrate the utter futility of the position assumed here by the learned counsel, by a reference to a memorable instance in history when certain fanatics, under the reign of Frederick II, put little children to death with the intent of sending them to heaven, because the Master had written, "Of such is the kingdom." It does not appear that this good intent of slaying the innocents, with their sunny faces and sunny hearts, that they might send them at once to heaven, was of any avail in a court of justice.

I read also of a Swedish minister who found within the kingdom certain aged subjects who were the beneficiaries of a charity, whom he put brutally and cruelly to death, with the good intent of thereby increasing the trusts in the interest of the living who had a longer measure of days before them. I never read, senators, that any such plea as that availed in the courts of justice against the charge of murder with malice aforethought.

I dismiss this subject. It is a puerile conceit, unfit to be uttered in the hearing of senators, and condemned by every letter and line and word of the common law, "the growth of centuries and the gathered wisdom of a thousand years."

It is suggested by one of my honorable colleagues, [Mr. Williams,] and it is not unfit that I should notice it in passing, that doubtless Booth, on the 14th day of April, 1865, when he sent the pure spirit of your martyred President back to the God who gave it, thought, declared, if you please—"declared" is the proper word—declared that he did that act in the service of his country, in the service of liberty, in the service of law, in the service of the rights of a common humanity. If the avenging hand of justice had not cut him off upon the

Digitized by Google

spot where he stood, instantly, as though overtaken by the direct judgment of offended Heaven, I suppose we should have had this sort of argument interposed in his behalf that his intentions were good, and therefore the violated law itself ought to justify his act and allow him to go acquit, not a condemned criminal, but a crowned and honored man.

I really feel, senators, that I ought to ask your pardon for having dwelt upon this proposition; but you know with what pertinacity it has been pressed upon the consideration of senators, and, with all respect to the learned and accomplished gentlemen who made it, I deem it due to myself to say here that I think it was unworthy of them and unworthy of the place.

I return, senators, to my proposition: has the President power under the Constitution and the laws during the session of the Senate to create vacancies in the heads of departments under your Constitution, and fill them without the authority of express law and without the advice or consent of the Senate? If he has not, he has violated the Constitution, and he has violated, as I shall show hereafter, the express law of the land, and is, therefore, criminal—criminal in his conduct and in his intention before the tribunal where he stands arraigned by order of the people.

First, then, is the Constitution violated by this act of removal and appointment? And here, senators, although I may have occasion to notice it hereafter more specifically and especially, I ask you to pardon me for referring to it here at this time, it cannot have escaped your notice that the learned and astute counsel for the President took care all the while from the beginning to the end of this controversy not to connect the two powers of removal and appointment during the session of the Senate in their presence and without their consent together.

Every line and word of the voluminous arguments uttered by the very learned and ingenious counsel of the President bears witness to the truth of that which I now assert. Why was this? Simply, senators, as I shall presently show you, that the appointing power is by the express terms of the Constitution, during the session of the Senate, put beyond the power of the President, save and except where it is expressly authorized by law. I thank the gentlemen for making this concession, for it is a confession of guilt on the part of their client. When no answer could be made they acted upon the ancient, time-honored, and accepted maxim that silence is gold, and so upon that point they were silent, one and all, without exception. There was an appointment made here in direct violation of express law; in direct violation of the express letter of the Constitution; in direct violation of every interpretation that has ever been put upon it by any commanding intellect in this country, and the gentlemen knew it.

It is in vain, senators, that they undertake to meet that point in this case by any reference to the speech of my learned and accomplished friend who represents the State of Ohio upon the floor of the Senate, [Mr. Sherman.] Not a word escaped his lips in the speech which they have quoted here touching this power of appointment during the session of the Senate, and in direct violation of the express letter of the tenure-of-office act, nor did any such word escape from the lips of any senator. I am not surprised; it does credit to the intellectual ability of the learned gentlemen who appear for the President that they kept that question out of sight in their elaborate and exhaustive arguments. I read, senators, the provision of the Constitution upon this subject which I read yesterday:

The President * * * shall nominate, and by and with the advice and consent of the Senate shall appoint, embassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

Digitized by Google

Can any one doubt that this provision clearly restricts the power of the President over the appointment of heads of departments in this, that it expressly requires that all appointments not otherwise provided for in this Constitution, enumerating embassadors and others, shall be by and with the advice and consent of the Senate? It is useless to waste words upon the proposition. It is plain and clear. It must be so unless the appointments of the heads of departments, in the words of the Constitution, are otherwise provided for; and I respectfully ask senators wherein are they otherwise provided for in the Constitution? The heads of departments are named by that title, and by the very terms of the Constitution it is provided that the Congress may by law vest in the heads of departments the power to appoint without the consent of the President, without the consent of anybody but the authority of a law of Congress, all inferior officers. Is any man, in the light of this provision, to stand before the Senate and argue that heads of departments are inferior officers? If, then, their appointment is not otherwise provided for in the Constitution, which I take for granted, I ask the Senate whether their appointment is otherwise provided for by law?

I am not unmindful of the fact, in passing, that some of the learned counsel for the President said "here was no appointment; this was only an authority to fill a vacancy." The counsel are not strong enough for their client. They cannot get rid of his answer. He declares that he did make an appointment indefinitely, made a removal and filled it, and followed it with another. The words "appointment *ad interim*" more than once unwittingly escaped the lips of the counsel. But I do not propose to rest this case upon any quibbles, upon any technicalities, upon any controversy about words. I rest it upon the broad spirit of the Constitution, and stand here this day to deny that there ever was an hour since the Constitution went into operation that the President of the United States had authority to authorize anybody, temporarily even, to exercise the functions of a head of a department of this government save by the authority of express law. It is surely a self-evident proposition that must be understood by senators that the power which created the law may repeal it.

I make this remark here and now because the President's defence, as stated in his answer more clearly and distinctly than in any of the arguments of the learned counsel, is that he asserts and exercises this power by virtue of the implied, unwritten executive prerogative judicially to interpret the Constitution for himself and judicially to determine the validity of all the laws of the land for himself, and therefore to appoint just such ministers as he pleases, at such times as he pleases, and for such periods as he pleases, in defiance alike of the Constitution and of the laws. The language is that the removal was indefinite. The language of his answer is that he indefinitely vacated the office, and filled it, of course indefinitely, and that is his defence. There is no getting away from it. In the answer, on pages 25 and 26 of the record, this will be found:

> And this respondent, further answering, says, that it is provided in and by the second section of an act to regulate the tenure of certain civil offices, that the President may suspend an officer from the performance of the duties of the office held by him, for certain causes therein designated, until the next meeting of the Senate, and until the case shall be acted on by the Senate; that this respondent, as President of the United States, was advised, and he verily believed and still believes, that the executive power of removal from office confided to him by the Constitution, as aforesaid, includes the power of suspension from office at the pleasure of the President, and this respondent, by the order aforesaid, did suspend the said Stanton from office, not until the next meeting of the Senate, or until the Senate should have acted upon the case, but by force of the power and authority vested in him by the Constitution and laws of the United States, indefinitely and at the pleasure of the President.

That is his answer. Under the Constitution he claims this power. On that subject, senators, I beg leave to say, in addition to what I have already uttered, that it is perfectly well understood when the Constitution was on trial for its deliverance before the American people that no such power as this was lodged

Digitized by Google

in the President of the United States; on the contrary, that for every abuse of power, for every usurpation of authority, for every violation of the Constitution and the laws, he was liable at all times to that unrestricted power of the people to impeach him through its representatives and to try him before its Senate without let or hindrance from any tribunal in the land. I refer upon this point to the clear utterance of Hamilton as recorded in the 77th number of the Federalist:

It has been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. *The consent of that body would be necessary to displace as well as to appoint.* A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body, which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government.

To this union of the Senate with the President, in the article of appointments, it has in some cases been objected that it would serve to give the President an undue influence over the Senate; and in others that it would have an opposite tendency; a strong proof that neither suggestion is true.

To state the first, in its proper form, is to refute it. It amounts to this: the President would have an improper influence over the Senate, because the Senate would have the power of restraining him. This is an absurdity in terms.

And I agree with Hamilton that it is an absurdity in terms after what has been written in the Constitution of your country, for any man, whatever may be his attainments, and whatever may be his pretensions, to say that the President has the power, in the language of his answer, of indefinitely vacating all the executive offices of this country, and indefinitely, therefore, filling them without the advice and consent of the Senate in the absence of an express law authorizing him so to do. And here I leave that point for the consideration of the Senate and for the consideration of that great people whom the Senate represent upon this trial.

I ask, also, the judgment of the Senate upon the weighty words of Webster, whom the gentleman [Mr. Evarts] concedes is entitled to some consideration in this body, who illustrated for long years American institutions by his wisdom, his genius, and his learning; a man who, when living, stood alone among living men by reason of his intellectual stature; a man who, when dead, sleeps alone in his tomb by the sounding sea, meet emblem of the majesty and sweep of his matchless intellect. I ask senators' attention to the words of Mr. Webster on this appointing power conferred upon the President under the Constitution, subject to these limitations, by and with the advice and consent of the Senate:

The appointing power is vested in the President and Senate; this is the general rule of the Constitution. The removing power is part of the appointing power; it cannot be separated from the rest but by supposing that an exception was intended; but all exceptions to general rules are to be taken strictly, even when expressed; and, for a much stronger reason, they are not to be implied, when not expressed, unless inevitable necessity of construction requires it. (4 Webster's Works, p. 194.)

What answer, I pray you, senaters, has been given, what answer can be given to these interpretations of your Constitution by Hamilton and Webster? None, except to refer to the acts of 1789 and 1795, and the opinions expressed in the debates of the first Congress. Neither those acts nor the debates justify the conclusion that the President during the session of the Senate may vacate and fill the executive departments of this government at his pleasure, and without the advice and consent of the Senate, in the absence of any express authority of law and in direct violation of the prohibitions of the law. The acts themselves will bear no such interpretation. I dismiss, with a single word, all reference to

Digitized by Google

the debate on the occasion, for the Senate are not unadvised that there were differences of opinion expressed in that debate, nor is the Senate unadvised that it has already been ruled from the Supreme Bench of the United States that the opinions expressed by representatives or senators in Congress pending the discussion of any bill are not to be received as any authoritative construction or interpretation whatever to be given to the act. It would be a sad day for the American people if the time should ever come when the utterances of excited debate are to be received ever afterward as the true construction and interpretation of law. Senators, look at the acts, and see whether the gentlemen are justified in attempting to infer either from the legislation of 1789 or from the legislation of 1795, or from any other legislation which at any time existed on statute-books of this country, this executive prerogative, in direct violation of the express letter of the Constitution, to vacate all the executive offices of this government at his pleasure, and fill them during the session of the Senate, and thereby control the patronage of the government, amounting to millions upon millions, at his pleasure, and put it into the hands of irresponsible agents to become only the supple tools of his mad ambition.

Of this act of 1789 Mr. Webster well said—and I am not here even to dispute the proposition; indeed, I would hesitate long before I ventured to dispute any proposition which he accepted, for the time being, as possible under the Constitution—that he did not condemn the legislation of 1789 as being unconstitutional, but he did condemn it as being highly impolitic, and which had subjected the people of this country to great abuses. He did say, however—and to these words I ask, also, the attention of the Senate—of the legislation of 1789, "that it did separate the power of removal from the power of appointment." It did separate it, subject to its own limitations. It did separate it, and confer it, too, by authority of that act and by no other authority. It is for this purpose, and for this purpose alone, that I cited Mr. Webster in this part of the argument. It was a grant of power to the President, conferred upon him by the Congress to remove executive officers. I admit, senators, that during the recess of the Senate such a statute ought to be always upon your statute book, so long as you have a President who can be trusted. A man who is betraying his trusts ought to be suspended from his office, which is a temporary removal, for reasons appearing to the President which justify it; and that is precisely your law to-day. It is within the power of the Congress, undoubtedly, to confer it upon the President. That is your law to-day.

What one of the counsel now, I ask the Senate to consider, ventured to say here—if it was uttered it certainly escaped my observation—that the President of the United States at any time had power during the session of the Senate to vacate the offices of the heads of the departments in this country, even under the act of 1789, and fill them indefinitely at his pleasure? What practice in the government was cited here to support any such pretension of power in the Executive? None whatever. To be sure, reference was made to the case of Pickering; but the gentlemen ought to remember that when reference was made to it, so far as the removal was concerned, it was expressly authorized by the act of 1789; I care not how informally; the words are in that act "unless removed by the President;" it is a grant of power, and Webster so interprets it on page 194 of the fourth volume of his works as an act of Congress which separated the power of removal from the power of appointment. His construction was right. Upon that construction I stand in this argument. But it does not follow by any manner of means because this power was exercised by the elder Adams that he thereby furnished a precedent in justification of the violation of another and a different statute, which by every intendment repealed the act of 1789 and stripped the President of any colorable excuse for asserting any such authority.

That is my first answer to this point made by the counsel, and I make a still

Digitized by Google

further answer to it; and that is this, that the elder Adams himself, as his letter to his Secretary of State clearly discloses, did not consider that it was proper even under the law of 1789 for him to make that removal during the session of the Senate, and therefore these significant words are incorporated in his letter of request to Secretary Pickering that he should resign before the session of the Senate, the resignation, of course, to take effect at a future day, so that upon the incoming of the Senate he might name a successor, showing exactly how he understood the obligations of the Constitution.

Although the record, so far as I have been able to trace it, is somewhat imperfect, I think it but justice to the memory of that distinguished patriot to declare that the whole transaction justifies me in saying here, as my belief, in the presence of the Senate, that he did not issue the order for the removal of Pickering after the Senate had commenced its session. It is true that he issued it on the same day, but he did not issue it after the Senate had commenced its session; he issued it before; and upon the assembling of the Senate and the opening of the Senate on the same day, showing his respect for the Constitution and the laws and the obligation of his oath, he sent to the Senate the name of the successor of Pickering, John Marshall, and on the next day, Tuesday, John Marshall, as Secretary of State, was confirmed to succeed Timothy Pickering, removed by and with the advice and consent of the Senate. Nor does it appear that John Marshall exercised the functions of his office, or attempted to exercise the functions of office, until the Senate had passed upon the question of his appointment, and therefore necessarily passed upon the question of the removal of Pickering. All these facts arise in this case in the removal of Pickering to disprove everything that has been said here by way of apology or justification, or even of excuse of the action of the President of the United States in violating the Constitution and the existing laws of the country.

But the other provision of the Constitution, senators, which I recited yesterday in your hearing, pours a flood of light upon this question as to the power of the President to vacate the executive offices and fill them at his pleasure, and dispels the mists with which counsel have attempted to envelop it, and that is the provision that the President shall have power to fill up all vacancies which may happen during the recess of the Senate, and to issue commissions to his appointees to fill such vacancies, which commissions shall expire at the end of the next session of the Senate. I ask senators what possible sense is there in this express provision of the Constitution that the President shall have power to fill up all vacancies which may happen during the recess of the Senate, his commissions to expire at the end of their next session, if after all, as is claimed in his answer and is asserted by his unlawful acts under the laws of the United States, he is invested by the Constitution with the power to make vacancies at his pleasure even during the session of the Senate? I ask senators, further, to answer what sense is there in the provision that the commission which he may issue to fill a vacancy happening during the recess of the Senate shall expire at the end of their next session, if after all, notwithstanding this limitation of the Constitution, the President may, during the session, create vacancies and fill them, in the words of his answer, indefinitely? If he has any such power as that, I may be allowed to say here, in the words of John Marshall, your Constitution at last is but a splendid bauble; it is not worth the paper upon which it is written. It is a matter of mathematical demonstration upon the text of this instrument, by necessary implication, that the President's power to fill vacancies is limited to vacancies that arise during the recess of the Senate, save where it is otherwise provided for by express provision of the law.

That is my answer to all that has been said here by the gentlemen upon this subject. They have brought a long list of appointments and a long list of removals from the foundation of the government to this hour, which is answered by a single word, that there was existing law authorizing it all, and that law no

longer exists. Not a line or word or tittle of it exists since the 2d day of March, 1867; assuming in what I say now, of course, that the tenure-of-office act is constitutional and valid, I refer to those statutes; I shall not exhaust my strength or the patience of the Senate by stopping to read them here and now, but I shall refer to them in the report of my argument. Those statutes are as follows:

ACT to provide for government of territory northwest of river Ohio. Approved August 7, 1789.

Be it enacted, &c., That in all cases in which by the said ordinance (for government of territory northwest of river Ohio) any information is to be given or communication made by the governor of the said Territory to the United States in Congress assembled, or to any of their officers, it shall be the duty of the said governor to give such information and to make such communication to the President of the United States; and the President shall nominate, and by and with the advice and consent of the Senate, shall appoint, all officers who, by the said ordinance, were to have been appointed by the United States in Congress assembled, and all officers so appointed shall be commissioned by him; and in all cases where the United States in Congress assembled might by the said ordinance revoke any commission or remove from any office, the President is hereby declared to have the same powers of revocation and removal. (1 Statutes, p. 50, sec. 1.)

ACT to amend the act entitled "An act making alterations in the Treasury and War Departments." Approved February 13, 1795.

In case of vacancy in the office of Secretary of State, Secretary of the Treasury, or of the Secretary of the Department of War, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed or such vacancy be filled: *Provided*, That no one vacancy shall be supplied in manner aforesaid for a longer term than six months. (1 Statutes, 415; 1 Brightly's Digest, 225.)

AN ACT to limit the term of office of certain officers therein named, and for other purposes. Approved May 15, 1820.

From and after the passage of this act, all district attorneys, collectors of the customs, naval officers and surveyors of the customs, navy agents, receivers of public moneys for lands, registers of the land offices, paymasters in the army, the apothecary general, the assistant apothecary general, and the commissary general of purchases, to be appointed under the laws of the United States, shall be appointed for the term of four years, but shall be removable from office at pleasure. (3 Statutes, 582.)

AN ACT to regulate the diplomatic and consular systems of the United States. Approved August 18, 1856.

Section one regulates the appointment and compensation of consuls.

It belongs exclusively to the President, by and with the advice and consent of the Senate, to appoint consular officers at such places as he or they deem to be meet. They are officers created by the Constitution and the laws of nations and by acts of Congress. (11 Statutes, 52, section 3; 1 Brightly, 174, Note (a;) and see also the provision touching appointments.)

If this provision of the Constitution then means what it expressly declares, that the President's power of appointment, in the absence of express law, is limited to such vacancies as may happen during the recess of the Senate, it necessarily results that an appointment made by the President during the session of the Senate, without the advice and consent of the Senate, of the head of a department, in the absence of any law authorizing it to be made temporarily or otherwise, as did the act of 1795, is unconstitutional and unlawful, and that is my answer to all they have said on that subject; but that act of 1795 is repealed by your statute of 1867, as also by your act of 1863, as I shall claim. If the President may issue it, it must be a commission according to his own claim of authority, arising under this unlimited executive prerogative, which can never expire but by and with his consent; and if any man can answer the proposition I should like to have it answered now. If, notwithstanding all that is on your statute books; if, notwithstanding this limitation of your Constitution which I have read, that his commissions to fill vacancies arising during the recess shall expire

Digitized by Google

with the next session of the Senate, he may nevertheless create the vacancies during the session and fill them without your advice and consent, I reassert my proposition that such commission cannot expire, if his assertion be true, without the consent of the Executive; and if that proposition can be answered by any man, I desire it to be answered now. I want to know by what provision of the Constitution the commission expires upon the claim of this answer? and if it does not expire without the consent of the Executive, I want to know what becomes of the appointing power lodged jointly in the Senate with the Executive for the protection of the people's rights and the protection of the people's interests? It cannot be answered here or anywhere by a retained advocate of the President, or by a volunteer advocate of the President, in the Senate or out of the Senate.

I demand to know, again, what provision of the Constitution, under the claim set up in this answer, terminates the commission? I took occasion to read from the answer that I might not be misunderstood. He puts it directly upon the Constitution. Nobody is to be held responsible for it; and I am glad it is so, either by intendment or otherwise—nobody is to be held responsible for this assumption but this guilty and accused President. It was an audacity, the like of which has no parallel in centuries, for him to come before the custodians of the people's power and thus defy even their written Constitution, its plainest text and its plainest letter.

Senators, I have thought upon this subject carefully, considerately, conscientiously. I have endeavored to find anywhere within the text of the Constitution any colorable excuse for this claim of power asserted by the President and dangerous to the liberties of the people, and I can find, from beginning to end of that great instrument, no letter or word upon which even the astutest casuist could for a moment fasten, save the words that "the executive power shall be vested in a President."

That gives no colorable excuse for this assumption. What writer upon your Constitution, what decision of your courts, what utterances of all the great statesmen who have in the past illustrated our history, have ever intimated that this provision of the Constitution was a grant of power? It is nothing more, Senators, and no man and no human ingenuity can torture this provision of the Constitution into anything more than a mere designation of the officer or person to whom shall be committed, under the Constitution and subject to its limitations and subject to the further limitations of the law enacted in pursuance of the Constitution, the executive power of the government. Adopt the construction that it is a grant of power, and why not follow it to its conclusions and see what comes of your Constitution, and what comes of the rights of the people, of their power to limit by a written Constitution every department of the government? Is it not as plainly written in the Constitution that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives?" Is anybody to reason from that designation of the body to whom the legislative power is assigned a grant of power, and especially an indefinite authority, to legislate upon such subjects as they please without regard to the Constitution? Is it not also just as plainly written in the Constitution that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish" by law? Is anybody thence to infer that this is an unlimited grant of power authorizing the Supreme Court or the inferior courts of the United States to sit in judgment upon any and all conceivable questions, and even to reverse by their decisions the power of impeachment, lodged exclusively in the House of Representatives, and the judgment in impeachment, authorized to be pronounced exclusively and only by the Senate of the United States?

It will never do for any man to say that this provision of the Constitution is

Digitized by Google

a grant of power. It is simply the designation of the officer to whom the executive power of the government shall be committed under the limitations of the Constitution and the laws, as "the Congress" is the designation of the department to which shall be committed the legislative power, and as "the courts" is the designation of the department to which shall be committed the judicial power; and upon this subject I refer, also, to what Mr. Webster said touching the limitations of the executive authority:

It is perfectly plain and manifest, that, although the framers of the Constitution meant to confer executive power on the President, yet they meant to define and limit that power, and to confer no more than they did thus define and limit. When they say it shall be vested in a President, they mean that one magistrate, to be called a President, shall hold the executive authority; but they mean, further, that he shall hold this authority according to the grants and limitations of the Constitution itself. (4 Webster's Works, p. 186.)

Does not the Constitution, Senators, define and limit the executive power in this, that it declares that the President shall have power to grant reprieves and pardons, &c.; in this, that it declares that the President shall have power to appoint, by and with the advice and consent of the Senate, foreign ambassadors and other public officers; in this, that it provides that he shall have power to make treaties by and with the advice and consent of the Senate? And does it not limit his power in this, that it declares that all legislative power shall be vested in a Congress which shall consist of a Senate and House of Representatives; in this, that it declares that the President shall take care that the laws which the Congress enacts shall be faithfully executed; in this, that it declares that every bill which shall have passed the Congress of the United States with or without his consent shall be a law, to remain a law—and that is the very point in controversy here between the President and the people—and to be executed as a law until the same shall have been repealed by the power that made it or actually reversed by the Supreme Court of the United States in a case clearly within its jurisdiction and within the limitations of the Constitution itself?

It has been settled law in this country from a very early period that the constitutionality of a law should not be questioned, much less be adjudged invalid, by a court clothed by the Constitution with jurisdiction in the premises, unless upon a case so clear as to scarcely admit of a doubt; and what is the result, Senators? that there is not—I feel myself justified in saying it, without recently having very carefully examined the question—one clear, unequivocal decision of the Supreme Court of the United States against the constitutionality of any law whatever enacted by the Congress of the United States—not one. There was no such decision as that in the Dred Scott case. Lawyers will understand, when I use the word "decision," what I mean—the judgment pronounced by the court upon the issue joined upon the record. There was no such decision in that case, nor in any other case, so far as I can recollect. On this subject, however, I may be excused for reading a decision or two from our courts. In the case of Fletcher *vs.* Peck, 6 Cranch, page 87, Marshall, delivering the opinion, said:

The question whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case.

And again:

The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In *ex parte* McCullom, 1 Cowen's Reports, 564, Chief Justice Savage says:

Before the court will deem it their duty to declare an act of the legislature unconstitutional a case must be presented in which there can be no rational doubt.

In Morris *vs.* The People, 3 Denio, 381, the court say:

The presumption is always in favor of the validity of the law, if the contrary is not clearly demonstrated.

Digitized by Google

I have read these, senators, not that it was really necessary to my argument, but to answer the pretension of this President that he may come here to set aside a law, and in order to justify himself assume the prerogative to do it in order that he may test its validity in the courts of justice when the courts have never ventured upon that dangerous experiment themselves, and, on the contrary, have thirty years ago, as I showed to the Senate yesterday, solemnly ruled, without a dissenting voice, that the assumption of power claimed by the President would defeat justice itself and annihilate the laws of the people. I have done it also to fortify the text of your Constitution and to make plain its significance, which declares that every bill which shall have passed the Congress with or without the President's approval, even over his veto, shall be a law. The language is plain and simple. It is a law until it is annulled; in the words of Hamilton, as recorded in the seventh volume of his works, a law to the President; a law to every department of the government, legislative, executive, and judicial; a law to all the people.

It is in vain the gentlemen say that it is only constitutional laws that bind. That is simply begging the question. The presumption, as I have shown you from the authorities, is that every law is constitutional until by authority it is declared otherwise, and the question here is whether that authority is in Andrew Johnson. That is the whole question, whether that authority is in Andrew Johnson. Your Constitution says it shall be a law. It does not mean that it shall remain a law after it shall have been reconsidered by the law-making power and repealed; it does not say that it shall remain a law to the hurt and deprivation of private right after it shall have been adjudged unconstitutional in the Supreme Court of the United States under the limitations of the Constitution and within their express jurisdiction; but it does mean that until judgment be pronounced authoratively in your tribunals of justice, or that power be exercised authoritatively by the people's representatives in Congress assembled, it shall be a law to the President, to every head of department, as the court ruled in the case from which I read yesterday in 12 Peters, to every representative in Congress, to every senator, and every human being within the jurisdiction of your laws.

Why do the gentlemen make the distinction, that it is only laws passed in pursuance of the Constitution that are to bind? Why not follow their premises to their logical conclusions that the President of the United States, as I took occasion to say yesterday, is by virtue of the prerogatives of his office vested with the power judicially to interpret the Constitution for himself and judicially to decide for the time being for himself the validity of every law, and therefore may, with impunity, set aside every law upon your statute-book, in the words of his advocate, for the reason that he has come to the deliberate conclusion that it interferes with some power vested in him by the people?

Senators, considering the operations of the President's mind as manifested in his past official conduct, God only knows to what absurd conclusions he might arrive hereafter, if by your judgment you recognize this unlimited prerogative in him, when he comes to sit in judicial judgment upon all the laws upon the statute-book. He might come to the conclusion that they all interfered with and cut off some power confided to him by the Constitution!

The position conflicts with every principle of law and every principle of common sense. If this discretionary power is in the President no man can lay his hand upon him. That was exactly the ruling of his honor the Chief Justice, in the Mississippi case, touching the exercise of certain discretionary power vested in the President by the reconstruction act. His judgment, where the law vests in him discretionary power, concludes everybody; the courts cannot review his decisions, and unless you charge him with corruption there is an end of all inquiry. It was settled more than fifty years ago, in the case to which I referred yesterday from memory, reported in 12 Wheaton, and has never been

Digitized by Google

challenged from that day to this. I deny any such discretion in the Executive, because it is a discretion incompatible with the public liberties, because it is a discretion in direct conflict with the express letter of the Constitution, because it is a discretion which vests him with more than kingly prerogative, because it is a discretion which puts the servant above his master, because it is a discretion which clothes the creature with power superior to the power of its creator.

The American people will tolerate no such discretion in the Executive, by whomsoever sanctioned or by whomsoever advocated. When that day comes that the American people will tamely submit to this assumption of authority that their President is above their Constitution and above their laws, and may defy either or both at his pleasure with impunity, they will have proved themselves unfit custodians of the great trust which has been committed to their care in the interests of their children and in the interests of the millions that are to come after them. I have no fear of the results with the people. Their instincts are all right. They understand perfectly well that the President is but their servant to obey their laws in common with themselves, and to execute their laws in the mode and manner as the laws themselves prescribe; and not to sit in judgment day by day upon their authority to legislate for themselves and to govern themselves by laws duly enacted through their representatives in Congress assembled.

And this brings me, Senators, to the point made by the learned gentleman from New York when he talked of the coming struggle in which the President and his friends, headed doubtless by the learned gentleman himself, would march under the banner of the "supremacy of the Constitution" against the "omnipotence of Congress." I have uttered no word, nor have my associates uttered any word, that justified any suggestion about the omnipotence of Congress. I can understand very well something about the omnipotence of a Parliament under the protection of a corrupt, hereditary monarch, of whom it may be said, and is said by his retainers, "He rules by the grace of God and of divine right;" but I cannot understand, nor can plain people anywhere understand, what significance is to be attached to this expression, "the omnipotence of Congress"—a Congress the popular branch of which is chosen every second year by the suffrages of freemen. I intend to utter no word, as I have uttered no word from the beginning of this contest to this hour, which will justify any man in intimating that I claim for the Congress of the United States omnipotence. I claim for it simply the power to do the people's will as required by the people in their written Constitution and enjoined by their oaths.

It does not result, because we deny the power of the Executive to sit in judicial judgment upon the legislation of Congress, that unconstitutional enactments, abuses of power, usurpations of authority, and corrupt practices on the part of a Congress, are without a remedy. The first remedy under your Constitution is in the courts of the United States, in the mode and manner prescribed by your Constitution; and the last great remedy under your Constitution is with the people that ordain constitutions, that appoint senators, that elect Houses of Representatives, that establish courts of justice, and abolish them at their pleasure.

The gentleman can alarm nobody by talking about an omnipotent Congress. If the Congress abuse its trust let it be held to answer for that abuse; but in God's name, let the Congress answer somewhere else than to the President of the United States. Your Constitution has declared that they shall answer to no man for their legislation or for their words uttered in debate, save to the respective houses to which they belong, and to that great people who appoint them.

That is my answer to the gentleman's clamor about an omnipotent Congress. Among the American people there is nothing omnipotent and nothing eternal but God, and no law save His and the laws of their own creation, subject to the

Digitized by Google

requirements of those laws to which the gentleman so eloquently referred the other day, which He wrote upon the stone table amid the earthquake and the darkness of the mountain, and a part of which, I deeply regret to say, the gentleman, in his eloquent discourse, both forgot and broke. We are the keepers of our own conscience. It was well enough for the gentleman to remind the senators of the obligation of their oath. It was well enough for the gentleman to suggest to them, so elegantly as he did, the significance of those great words, "justice, law, oath, duty." It was well enough for him to repeat in the hearing of the Senate and in the hearing of this listening audience those grand words of the common Father of us all, "Thou shall not take the name of the Lord thy God in vain." But it was not well for the gentleman, in the heat and fire of his argument, to pronounce judgment upon the Senate, to pronounce judgment upon the House of Representatives, and to say, as he did say, that, unmindful of the obligations of our oaths, regardless of the requirements of the Constitution, forgetful of God and forgetful of the rights of our fellow-men, in the spirit of hate, we had preferred these articles of impeachment.

It was not well for the gentleman, either, to intimate that the Senate of the United States had exercised a power that did not belong to them, when, in response to the message of the President of the United States of the 21st of February, 1868, they had resolved that the act done by the President and communicated to the Senate, to wit, the removal of the head of a department and the appointment of a successor thereto without the advice and consent of the Senate, was not authorized by the Constitution and laws. It was the duty of the Senate, if they had any opinion upon the subject, to express it; and it is not for the President of the United States, either in his own person or in the person of his counsel, to challenge the Senate as disqualified to sit in judgment under the Constitution, as his triers, upon articles of impeachment, because, in the discharge of another duty, they had pronounced against him. They pronounced aright. The people of the United States will sanction their judgment whatever the Senate may think of it themselves.

Senators, that all that I have said in this general way of the power assumed and exercised by the President and attempted to be justified here is directly involved in this issue, and underlies this whole question between the people and this guilty President, no man can gainsay.

1. He stands charged with a misdemeanor in office in that he issued an order in writing for the removal of the Secretary of War during the session of the Senate, without its advice and consent, in direct violation of express law, and with intent to violate the law.

2. He stands charged, during the session of the Senate, without its advice or consent, in direct violation of the express letter of the Constitution and of the act of March 2, 1867, with issuing a letter of authority to one Lorenzo Thomas, authorizing him and commanding him to assume and exercise the functions of Secretary for the Department of War.

3. He stands charged with an unlawful conspiracy to hinder the Secretary of War from holding the office, in violation of the law, in violation of the Constitution, in violation of his own oath, and with the further conspiracy to prevent the execution of the tenure-of-office act, in direct violation of his oath as well as in direct violation of the express provisions of your statute; and to prevent, also, the Secretary of War from holding the office of Secretary for the Department of War; and with the further conspiracy, by force, threat, or intimidation, to possess the property of the United States and unlawfully control the same contrary to the act of July 20, 1861.

He stands charged further with an unlawful attempt to influence Major General Emory to disregard the requirements of the act making appropriations for the support of the army, passed March 2, 1867, and which expressly provides that a violation of its provisions shall be a high crime and misdemeanor in office.

Digitized by Google

He stands further charged with a high misdemeanor in this, that on the 18th day of August, 1866, by public speech he attempted to excite resistance to the thirty-ninth Congress and to the laws of its enactment.

He stands further charged with a high misdemeanor in this, that he did affirm that the thirty-ninth Congress was not a Congress of the United States, thereby denying and intending to deny the validity of its legislation except in so far as he saw fit to approve it, and denying its power to propose an amendment to the Constitution of the United States; with devising and contriving means by which he should prevent the Secretary of War, as required by the act of the 2d March, 1867, from resuming forthwith the functions of his office, after having suspended him and after the refusal of the Senate to concur in the suspension; and with further devising and contriving to prevent the execution of an act making appropriations for the support of the army, passed March 3, 1867, and further to prevent the execution of the act to provide for the more efficient government of the rebel States.

That these several acts so charged are impeachable has been shown. To deny that they are impeachable is, as I have said, to place the President above the Constitution and the laws, to change the servant of the people into their master, the executor of their laws into the violator of their laws. The Constitution has otherwise provided, and so it has been otherwise interpreted by one of the first writers upon the law in America; I refer to the text of Chancellor Kent, which the gentlemen were careful not to read:

> In addition to all the precautions which have been mentioned to prevent abuse of the executive trust in the mode of the President's appointment, his term of office, and the precise and definite limitations imposed upon the exercise of his power, the Constitution has also rendered him directly amenable by law for maladministration. The inviolability of any officer of government is incompatible with the republican theory, as well as with the principles of retributive justice. The President, Vice-President, and all civil officers of the United States may be impeached by the House of Representatives for treason, bribery, and other high crimes and misdemeanors, and upon conviction by the Senate removed from office. If, then, neither the sense of duty, the force of public opinion, nor the transitory nature of the seat are sufficient to secure a faithful discharge of the executive trust, but the President will use the authority of his station to violate the Constitution or law of the land, the House of Representatives can arrest him in his career by resorting to the power of impeachment. (1 Kent's Commentaries, p. 289.)

And what answer is made when we come to your bar to impeach them; when we show him guilty of maladministration as no man ever was before in this country; when we show that he has violated your Constitution; when we show that he has violated your laws; when we show that he has defied the power of the Senate even after they had admonished him of the danger that was impending over him? The answer is, that he is vested with an unlimited prerogative to decide all these questions for himself, and to suspend even your power of impeachment in the courts of justice until some future day, which day may never come, when it will suit his convenience to test the validity of your laws and consequently the uprightness of his own conduct before the Supreme Court of the United States. There never was a balder piece of effrontery practiced since man was upon the face of the earth. I care not if he be President of the United States, it is simply an insult to the human understanding to press any such defence in the presence of his triers.

I have said enough and more than enough to show that the matter charged against the President is impeachable. I waste no words upon the frivolous questions whether the articles have the technical requisites of an indictment. There is no law anywhere that requires it. There is nothing in the precedents of the Senate of the United States, sitting as a high court of impeachment, but condemns any suggestion of the kind. I read, however, for the perfection of my argument rather than for the instruction of the Senate, from the text of Rawle on the Constitution, in which he declares "that articles of impeachment need not

Digitized by Google

be drawn up with the precision and strictness of indictments. It is all-sufficient that the charges be distinct and intelligible." They are distinct and intelligible; they are well enough understood, even by the children of the land who are able to read their mother tongue, that the President stands charged with usurpation of power in violation of the Constitution, in violation of his oath, in violation of the laws; that he stands charged with an attempt to subvert the Constitution and laws, and usurp to himself all the powers of the government vested in the legislative and judicial, as well as in the executive departments.

Touching the proofs, senators, little need be said. The charges are admitted substantially by the answer. Although the guilty intent is formally denied by the answer and attempted to be denied in argument, the accused submits to the judgment of the Senate that, admitting all the charges to be true, admitting them to be established as laid, nevertheless he cannot be held to answer before the Senate for high crimes and misdemeanors, because it is his prerogative to construe the Constitution for himself, to determine the validity of your laws for himself, and to suspend the people's power of impeachment until it suits his convenience to try the question in the courts of justice. That is the whole case; it is all there is to it or of it or about it, after all that has been said here by his counsel, and that was the significance of the opening argument, that he could only be convicted of such high crimes and misdemeanors as are kindred with treason and bribery. I believe I referred to that suggestion yesterday, and asked the Senate to consider that the offences whereof he is charged, whereof he is clearly guilty, and which he confesses himself in his answer are offences which touch the nation's life and endanger the public liberties, and cannot be tolerated for a day or an hour by the American people. I proceed, then, senators, as rapidly as possible, for I myself am growing weary of this discussion——

Mr. SHERMAN. Mr. President, if the honorable manager desires to pause at this moment in his argument, I will move that the Senate take the usual recess.

Mr. Manager BINGHAM. I thank the honorable senator from Ohio. I hope to be able to close my argument to-day, and if it is the pleasure of the Senate to take the recess now I will yield; but——

Mr. EDMUNDS. Would you prefer it now, or to proceed half an hour longer?

Mr. Manager BINGHAM. I will proceed for half an hour and then a recess can be taken.

Mr. SHERMAN. Very well; I withdraw my motion.

Mr. Manager BINGHAM. The first question that arises, senators, under the first article, is whether Mr. Stanton was the Secretary of War. That he was duly appointed in 1862, by and with the advice and consent of the Senate, is conceded. About that there is no question. As the law then stood, he was entitled to hold the office under his commission until removed by authority of the act of 1789, or by the authority of some other existing act in full force at the time of his removal; or otherwise he was not removable at all, without the advice and consent of the Senate. That is the position I take in regard to this matter, and I venture to say before the Senate that there is not one single word in the records of the past history of this country to contradict it. The act of 1789, as I have said before, authorized removal; but we shall see whether that act authorized his removal in 1867.

The gentlemen seem to think the tenure of his office depended upon the words of a commission. If that were so I would surrender the question; but I deny it. The tenure of his office depended upon the provisions of the Constitution and the existing law then or afterward in force, whatever it might be. There is no vested power in the President of the United States on this subject of removals and appointments during the session of the Senate beyond the reach of legislation; and he never had any power whatever over the question, except that joint power with the Senate, to which I have referred, in the Constitution, and the power expressly conferred by the legislation of Congress. The

Digitized by Google

power that conferred it clearly might take it away. The tenure-of-office act changed the law of 1789. The gentlemen have made elaborate arguments, showing that the act of 1863 did not necessarily, by repugnancy, repeal the whole of the act of 1789; and that portion of their argument was very significant as proving that it was competent for the Congress of the United States to put an end to all this talk about the tenure of an office depending, in any sense of the word, upon the language of a commission. It depends exclusively upon the provisions of existing laws. The act of 1867 has repealed the act of 1789, and it repealed the act of 1795 as well. That law provided for the suspension of all officers theretofore appointed and commissioned by and with the advice and consent of the Senate, and it provided for the suspension of all civil officers thereafter appointed by and with the advice and consent of the Senate, and no kind of sophistry can evade the plain, clear words of the law.

The gentlemen undertake to get up a distinction here between the office and the person who holds the office. No such distinction will avail them. This act of 1867 puts an end to all such quibbling. The office and the person who fills it are alike under the protection of the law and beyond the reach of the Executive, except as limited and directed by the law, and no man can gainsay it.

Every person—

I suppose that does not mean an office merely—

Every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided.

"Herein otherwise provided" had relation to the second section, which made provision for temporary removal by suspension:

Provided, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

SEC. 2. *And be it further enacted*, That when any officer appointed as aforesaid, excepting judges of the United States courts, shall, during a recess of the Senate, be shown, by evidence satisfactory to the President, to be guilty of misconduct in office or crime, or for any reason shall become incapable or legally disqualified to perform its duties, in such case, and in no other, the President may suspend such officer and designate some suitable person to perform temporarily the duties of such office.

"In such case, and in no other." What case? That he shall have become temporarily disqualified, incapable, or legally disqualified, or shall be guilty of misdemeanor in office or crime, in such case and no other shall the President suspend him. What other condition is there? That it shall be in the recess of the Senate, and so the section says:

That when any officer * * * * * * * * shall, *during a recess of the Senate*, be shown, by evidence satisfactory to the President, to be guilty of misconduct in office or crime, or for any reason shall become incapable or legally disqualified to perform its duties, in such case, and in no other, &c.

During the recess of the Senate, and not at any other time, shall the President suspend him and report within twenty days after their next meeting to the Senate the fact of suspension, the reasons and the evidence upon which it is made. There is a law so plain that no man can misunderstand it—a plain, clear, distinct provision of the law, that in such case and no other, to wit, during the recess and for the reasons, and only the reasons, named in the statute, shall he suspend from office any person heretofore appointed by and with the advice and consent of the Senate, or who may be hereafter appointed by and with the advice and consent of the Senate.

It is admitted that the Secretary of War and every other officer appointed with the advice and consent of the Senate, holding at the time of the enact-

Digitized by Google

ment of this law, was within the provisions of the body of the act. The President himself is prohibited by the act from removal, as he was authorized by the act of 1789 to make removals. There is no escape from the conclusion if gentlemen admit the validity of the law. What next? It is attempted to be said here that from the body of this act the secretaries appointed by Mr Lincoln were excepted. Who, pray, says that? I have just read to you the commanding words of Mr. Webster that exceptions, unless clearly expressed in the law, are never to be implied except where a positive necessity exists for their implication. It is a sound rule of construction. Who says that the heads of departments appointed by Mr. Lincoln are by the proviso excepted from the body of this act?

The gentlemen, in the absence of any further reason, undertook to quote from the speech of my learned and accomplished friend, the senator from Ohio, forgetting that one line of his speech declares expressly, by necessary intendment, that the existing Secretaries at the head of departments were within the provisions of the law, wherein he says that if the Secretary would not withdraw or resign upon the politest suggestion from the President he himself would consent to his removal. What significance can be attached to these words if they do not mean this: that by this law the President after all may not be permitted to remove the Secretary of War, but if he politely requests him to resign, and he should refuse to resign, the senator would himself consent to his removal?

As the matter then stood, the senator was doubtless entirely justified before the country in coming to that conclusion, for facts had not sufficiently disclosed themselves to show the necessity of the Secretary of War retaining his office in the light of the solemn decision of the Supreme Court that he was at liberty in spite of the President, under cover of that decision, to interpret the law for himself, to stand by the law for himself, subject to impeachment if he abused the trust, and in the words of the court not to take the law from the President. Times have changed. The President has more fully developed his character. It is understood now by the whole country, by the whole civilized world, that he has undertaken to usurp all the powers of this government and to betray the trust committed to him by the people through their Constitution.

The Secretary is said to be excepted by the proviso from the body of the statute. It is an afterthought. The President himself in his message, which I will take the liberty to cite, in the report notified the Senate that if he had supposed any member of his cabinet would have availed himself of the law to retain the office against his will he would have removed him without hesitation before it became a law. He supposed then he was within the law; they all supposed he was within the law.

Again, the President is concluded on this question, senators, because on the 12th day of August, 1867, he issued an order suspending Edwin M. Stanton, Secretary of War, under this act. What provision is there in the Constitution authorizing the President to suspend anybody for a day or an hour—a head of department—from office? Nobody ever claimed it; nobody ever exercised it. It is a thing unheard of altogether in the past history of the country. It never was authorized by any law, save the act of March 2, 1867, the tenure-of-office act. The language of the act is "suspension;" and, senators, pardon me, for I do not intend that this confessedly guilty man shall change front in the presence of the Senate in order to cover up his villainy. In his message to the Senate he not only quotes the word of the statute that he had suspended him, but he quotes the other word of the statute, that the suspension was not yet "revoked." I ask you, senators, when that word ever before occurred in the executive papers of a President of the United States, that he had "revoked" a suspension. It is the word of the tenure-of-office act that the President may, if he becomes satisfied that the suspension is made without just cause, revoke it; and he commu-

Digitized by Google

nicates to the Senate that the suspension was not yet revoked. He thought he was within the statute when he suspended him. He thought he was within the statute when he communicated to the Senate that he had not yet revoked the suspension. He thought he was within the statute when, in obedience to its express requirement, within twenty days after the next meeting of the Senate, he did, as required by the law, report the suspension to the Senate, together with the reasons and the evidence on which he made the suspension. It is too late for any man to come before the Senate and say that the President of the United States did not himself believe that the Secretary of War was within the operation of the statute; that he believed that he was excepted from its provisions by the operation of the proviso.

Moreover, his letter to the Secretary of the Treasury, reciting the eighth section of the tenure-of-office act, and notifying him that he had suspended Edwin M. Stanton, was a further recognition of the fact on his part that Mr. Stanton was within the provisions of the act. All of which I shall beg leave to quote, that it may be clearly understood by the Senate.

But that is not all. His own counsel who opened the case, [Mr. Curtis,] as will be seen by a reference to his argument, declares that there are no express words within the proviso that bring the Secretary of War, Edwin M. Stanton, within the proviso. That is his own position, and that being so, he must be within the body of the statute. There is no escape from it.

There has been further argument, however, on this subject that the President did not intend to violate the law. If he believed he was within the statute, and suspended him under the statute and by authority of the statute, and reported in obedience to the statute to the Senate within the next twenty days, with the reasons and the evidence upon which he made the suspension, it will not do to come and say now that the President did not intend to violate the law, that he did not think it obligatory upon him. If he did not think it obligatory upon him, why did he obey it in the first instance—why did he exercise power under it at all? There is but one answer, senators, that can be given, and that answer itself covers the President with ignominy and shame and reproach. It is this: "I will keep my oath; I will obey the law; I will suspend the head of a department under it by its express authority for the first time in the history of the republic; I will report the suspension to the Senate, together with the reasons and the evidence upon which the suspension was made; and if the Senate concur in the suspension I will abide by the law; if the Senate non-concur in the suspension, I will defy the law and fling my own record in their face, and tell them that it is my prerogative to sit in judgment judicially upon the validity of the statute." That is the answer, and it is all the answer that can be made to it by any man.

I admit, senators, upon this construction of the law, for I have not yet done with it, that the President in the first instance, as to the suspension within the limitation of the law, is himself the judge of the sufficiency of the reasons and the evidence in the first instance, and that he is not to be held impeachable for any honest error of judgment in coming to that conclusion. It would be a gross injustice to hold him impeachable for any honest error of judgment in coming to his conclusion that the Secretary of War was guilty of a misdemeanor or crime in office, that he had become incapable or legally disqualified to hold the office. But the President is responsible if, without any of the reasons assigned by the law, he nevertheless availed himself of the power conferred under the law to abuse it and suspend the Secretary of War though he knew he was not disqualified for any reason, though he knew that there was no colorable excuse for charging that he was guilty of misdemeanor or crime or that he had become in any manner legally disqualified; and this is the very crime charged against him in the eleventh article of impeachment, that he did attempt to violate the provisions of the tenure-of-office act in that he attempted to pre-

vent Edwin M. Stanton, Secretary of War, from resuming the functions of the office or from exercising the office to which he had been appointed by and with the advice and consent of the Senate in direct violation of the provisions of the act itself.

Now, what are his reasons? The President is concluded by his record and in the presence of the American people is condemned upon his record. What are his reasons? Let the Senate answer when they come to deliberate. What evidence did he furnish this Senate, in the communication made to it, that Edwin M. Stanton had become in any manner disqualified to discharge the duties of that office? What evidence did he furnish the Senate that he had been guilty of any misdemeanor or crime in office? What evidence was there that he was legally disqualified, in the words of the statute? None whatever. It results, therefore, senators, that the President of the United States, upon his own showing, judged by his own record, suspended Edwin M Stanton from the office of the Secretary of War and appointed a successor without the presence of any of the reasons named in the statute, and he is confessedly guilty before the Senate and before the world, and no man can acquit him.

Mr. WILSON. I move that the Senate take a recess for 15 minutes.

The motion was agreed to; and at the expiration of the recess, the Chief Justice resumed the chair, and called the Senate to order.

Mr. Manager BINGHAM. Mr. President and Senators, when the recess was taken I had said all that I desired to say, and all that I think it needful, to show that the President of the United States, himself being witness upon his own messages sent to the Senate of the United States, has been guilty, and is guilty in manner and form as he stands charged in the first, second, third, eighth, and eleventh articles of impeachment. It does seem hard, senators, and yet the interest involved in this question is so great that I do not feel myself at liberty to fail to utter a word that might, perhaps, be uttered fitly in this presence in the cause of the people, but it seems hard to be compelled to coin one's heart's drops into thoughts to persuade the Senate of the United States that a man who stands self-convicted on their records ought to be pronounced guilty. It ouches the concern of every man in this country, whether the laws are to be supreme, whether they are to be vindicated, whether they are to be executed, or whether at last, after all that has passed before our eyes, after all the sacrifices that have been made, after the wonderful salvation that has been wrought by the sacrifice of blood in the vindication of the people's laws, their own Chief Magistrate is to renew the rebellion with impunity, and violate the laws at his pleasure, and set them at bold defiance.

When the Senate took its recess I had shown, I think, to the satisfaction of every candid mind within the hearing of my voice, that the President, without colorable excuse, had availed himself of the authority conferred for the first time by the laws of the republic to suspend the head of a department, and had disregarded at the same time its express limitation, which declares that he shall not suspend him save during the recess of the Senate, and that only for the reason that from some cause he has become incapacitated to fill the office, as by the visitation of Providence, or has become legally disqualified to hold the office, or is guilty of a misdemeanor or of a crime. Without the shadow of evidence that your Secretary of War was incapacitated; without the shadow of evidence that he was legally disqualified; without the shadow of evidence that he was guilty of a misdemeanor or a crime, he dared to suspend him and to defy the people, in the presence of the people's tribunes, who hold him to answer for the violation of his oath, for the violation of the Constitution, and for the violation of the law. Senators, whatever may be the result of this day's proceeding, impartial history, which records and perpetuates what men do and suffer in this life, will do justice to your slandered and calumniated Secretary of War.

The gentleman [Mr. Groesbeck] spoke of him but yesterday as being a thorn

in the heart of the President. The people know that for four years of sleepless vigilance he was a thorn in the heart of every traitor in the land who lifted his hands against their flag and against the sanctuary of your liberties. He can afford to wait; his time has not come. His name will survive the trial of this day and be remembered with the names of the demigods and the heroes who, through an unprecedented conflict, saved the republic alive; and yet I charge your recusant President with calumny, with slander, when he suspends the Secretary of War under pretence, in the words of your statute, that he was guilty of a misdemeanor or a crime in office or had become legally disqualified. He was legally disqualified, undoubtedly, judging him by the President's standard, if the qualification of office is an utter disregard of the obligations of an oath. He was guilty of a misdemeanor and crime, undoubtedly, if, according to the President's standard, he was guilty of consenting that the Executive of the United States may, at his pleasure, suspend the people's laws and dispense with their execution—those laws which are enacted by themselves and for themselves and are for their protection, both while they wake and while they sleep, at home and abroad, on the land and on the sea.

Your Secretary of War, senators, whatever may be the result of this day's proceeding, will stand, as I said before, in the great hereafter, upon the pages of history as one who was "faithful found among the faithless;" a man equal in the discharge of his office, in every quality that can adorn or ennoble or elevate human nature, to any man of our own time or of any time; a man that was "clear in his great office;" a man who "organized victory" for your battalions in the field as man never organized victory before in the cabinet councils of a people since nations were upon the earth; and this man is to be suspended by a guilty and corrupt and oath-breaking President, under a law which he defies, and under the hollow and hypocritical pretence that he was guilty of misdemeanor or crime, or, in the language of the law, had become otherwise legally disqualified from holding the office.

I dismiss the subject. The Secretary needs no defence from me. And yet it was fit, in passing, that I should take this notice of what the President has done, not simply to his hurt, but to the hurt of the republic. I have said enough, senators, to satisfy you, and to satisfy all reasonable men in this country, that the President, when he made this suspension of the Secretary of War, had no doubt of the validity of this law, of its obligation upon him, and that the Secretary was within its provisions; and hence, availing himself of its express provisions, he did suspend him and made report, as I have said, to the Senate.

Now, what apology or excuse can be made for this abuse of the powers conferred upon the President, and of which he stands charged by impeachment here this day in that he has abused, in the language of the authority which I read yesterday in the hearing of the Senate, assented to in the Senate on the trial of Justice Peck without a dissenting voice, abused the power conferred upon him by the statute? The counsel may doubt, or affect to doubt, the tenure-of-office act; the President never doubted it until he was put on trial. When it was presented to him for his approval it was a question with him whether it was in accord with the Constitution; but after Congress had passed it by a two-thirds vote over his veto in the mode prescribed by the Constitution, the President thenceforward, until he was impeached by the people's representatives, recognized the obligation of the law and the plain, simple words of the Constitution, that if the bill be passed by a two-thirds vote over his veto it shall become a law to himself and to everybody else in the republic.

The counsel, however, doubt the validity of the law. They raise the question in the answer; they raise it in the argument. They intimate to the Senate that it is unconstitutional, and they state a very plain and very simple proposition. It is really a grateful thing—it is to me a very grateful thing—to be able to agree with counsel for the President upon any legal proposition whatever

They do state one proposition to which I entirely assent; and that is that an unconstitutional law is no law. But it is no law to the President, it is no law to the Congress, it is no law to the courts, it is no law to the people, only after its constitutionality shall have been decided in the mode and manner prescribed by the Constitution; and the gentleman who so adroitly handled that text as it came from the mighty brain of Marshall, knew it to be the rule governing the case just as well as anybody else knows it. It is a law until it shall have been reversed. It has not been reversed. To assume any other position would be to subject the country at once to anarchy, because, as I may have occasion to say in the progress of this argument, the humblest citizen in the land is as much entitled to the impunity which that proposition brings as is the President of the United States. It does not result, however, that the humblest citizen of the land, in his cabin upon your western frontier, through whose torn thatch the wintry rains come down, and through whose broken walls the winds blow at pleasure, is at liberty to defy the law upon the hypothesis that it is unconstitutional and to decide it in advance. The same rule applies to your President. Your Constitution is no respecter of persons.

Is, then, this law constitutional, is it valid, and did the President intend to violate its provisions? Senators, I said before that the rule of the common law and the common sense of mankind is, that whenever a man does an unlawful act, himself being a rational, intelligent, responsible agent, he intends precisely what he does, and there is an end to all further controversy. It sometimes happens, however—because in the providence of God truth is stronger than falsehood; it is linked to the Almighty, and partakes in some sort of his omnipotence—that a guilty conscience sometimes makes confessions and thereby contributes to the vindication of violated law and the administration of justice between man and man in support of the rights of an outraged and violated people. So it has happened, senators, to the accused at your bar. The President of the United States was no exception to that rule that "murder will out." He could not keep his secret. It possessed him; it controlled his utterances, and it compelled him in spite of himself, to stammer out his guilty purpose and his guilty intent, and thereby silence the tongue of every advocate in this chamber and of every advocate outside of this chamber who undertakes to excuse the poor man on the ground that he did not intend the necessary consequences of his own act. He did intend them and he confesses it.

And now I ask the Senate to note what is recorded on page 234 in the record, in his letter to General Grant, and see what becomes of this pretence that the intent is not proved; that he did not intend to violate the law; that he did not intend, in defiance of the express words of the law, which are that the Secretary shall forthwith resume the functions of his office in the event that the Senate shall non-concur in the suspension, and notify the Secretary of the fact of non-concurrence, all of which appears on your record, to prevent the Secretary from so assuming his office. The President, in his letter to General Grant of February 10, 1868, to be found on page 234 of the record, says:

> First of all, you here admit that from the very beginning of what you term "the whole history" of your connection with Mr. Stanton's suspension, you intended to circumvent the President. It was to carry out that intent that you accepted the appointment. This was in your mind at the time of your acceptance. It was not, then, in obedience to the order of your superior, as has heretofore been supposed, that you assumed the duties of the office. *You knew it was the President's purpose to prevent Mr. Stanton from resuming the office of Secretary of War.*

How could he know it if that was not the President's purpose? It would be, it seems to me—and I say it with all reverence—beyond the power of Omnipotence itself to know a thing that was not to be at all, and could not by any possibility be, and did not exist. "You knew it was the President's purpose to prevent Mr. Stanton from resuming the office of Secretary of War." And what says the law? That it shall be the duty of the suspended Secretary, if the

Digitized by Google

Senate shall non-concur in the suspension, "forthwith to resume the functions of the office." And yet the Senate are to be told here that we must prove intent! Well, we have proved it; and in God's name what more are we to prove before this man is to be convicted and the people justified in the judgment of their own senators? He says to General Grant in this letter, "It was my purpose, and you knew it, to prevent Mr. Stanton from resuming the functions of his office."

I give him the benefit of his whole confession. There is nothing in this stammering utterance of this violator of oaths, and violator of constitutions, and violator of laws, that can help him either before this tribunal or any other tribunal constituted, as this is, of just and upright men. He says further on:

You knew the President was unwilling to trust the office with any one who would not, by holding it, compel Mr. Stanton to resort to the courts.

And he knew as well as he knew anything, if he does indeed know anything at all—and if he does not, then order an inquest of lunacy and dispose of him on that account—he knew, if he knew anything at all, that if he prevented Mr. Stanton from resuming the office, Mr. Stanton could no more contest that question in your courts of justice than can the unborn; and the man who does not know it ought to be turned out of the office that he disgraces and dishonors for natural stupidity. He has abused the powers that have been given him. A man who has sense enough to find his way to the Capitol ought to have sense enough to know that. And yet this defence goes on here and the people are mocked and insulted day by day by this pretence that we are persecuting an innocent man, a defender of the Constitution, a lover of justice, a respecter of oaths!

I have said, senators, in the progress of this discussion, that this pretence of the President is an afterthought. The letter which I have just read is of date, you remember, February 10, 1868, in which he says that his object was to prevent Mr. Stanton from resuming the office. Then there is another assertion, which is also an afterthought, that he wished to drive him into the courts to test the validity of the law. If he prevented Mr. Stanton's resumption of the office there was an end of it; he never could get into the courts; and that question has been settled also in this country, and is no longer an open question, and the President knew it. The question has been ruled and settled, as I stated long ago in the progress of this controversy, in the case of Wallace *vs.* Anderson, 5 Wheaton, 291, where Chief Justice Marshall, delivering the opinion of the court, says:

A writ of *quo warranto*—

And it is the only writ by which the title to the office could be tested under your present laws—

could not be maintained except at the instance of the government, and as this writ was issued by a private individual, without the authority of the government, it could not be sustained, whatever might be the right of the prosecutor or of the person claiming the office in question.

This high court of impeachment, senators, is the only tribunal to which this question could by possibility be referred. Mr. Stanton could not bring the question here; the people could, and the people have, and the people await your judgment.

Senators, I now ask you another question. How does the President's statement that it was to compel Mr. Stanton to resort to the courts that he suspended him stand with the pretence of the President's answer that his, the President's, only purpose was to have the Supreme Court pass upon the constitutionality of the law? A tender regard this for the Constitution. He said this was his only purpose in breaking the law, the validity and the obligation of which, in the most formal and solemn manner, he had recognized by availing himself of its express grant to suspend the head of a department from the functions of his

office, and to appoint temporarily a successor, and report the fact to the Senate; and he now comes with his answer and says that his only purpose was to test the validity of the law in the Supreme Court! If that was his sole purpose, how comes it that the President did not institute the proceeding? The Senate will answer that question when they come to pass upon the defence which the President has incorporated in his plea. How comes it that he did not institute the proceeding? I think if the venerable senator from Maryland, [Mr. Johnson,] full of learning as he is full of years, were to respond here and now to that inquiry, he would answer, "Because it was impossible for the President to institute the proceeding."

Mr. Chief Justice, it is well known to every jurist of the country, as the question stands, and as the President left it, that there is no colorable excuse under the Constitution and laws of this country for saying that he could institute the proceeding. If he could not institute the proceeding, then, I ask again, why insult the people by mocking them with this bald, hypocritical assertion that his only purpose in all he did was to institute a proceeding on his own motion in the Supreme Court of the United States to test the validity of the people's laws? It is only an another illustration, surrounded as the President is by gentlemen learned in the law—and I cast no reproach upon them in saying it, for it was their duty to defend him; it was their duty to bring to his defence all their experience, all their learning, and all those great gifts of intellect and of heart with which it has pleased Providence to endow them—but at last it is only another evidence of what I said before, that, notwithstanding the advice and counsel of his learned and accomplished defenders, truth is at last stronger than falsehood, and only illustrates the grand utterance of that immortal man who in his blindness meditated a song so sublime and holy that it would not misbecome the lips of those ethereal virtues that he saw with that inner eye which no calamity could darken or obscure, who said—

> Who knows not that truth is strong,
> Next to the Almighty.

The President simply utters another falsehood when he comes before the Senate and says that his purpose in violating his oath, in violating your Constitution, in violating your laws, was, that he might test the validity of the statute in the Supreme Court of the United States, when he knew he had no power under the Constitution and laws to raise the question at all. There ends that part of the defence, and there I leave it.

The written order for the removal of the Secretary of War and the written letter of authority for the appointment of Lorenzo Thomas to the office of Secretary for the Department of War are simply written confessions of his guilt in the light of that which I have already read from the record, and no man can gainsay it. I dispose, once for all, of this question of intent by a text that doubtless is familiar to senators. The evidence being in writing, the intent necessarily results, if I am right at all in my apprehensions of the rule of law. I read from page 15 of 3 Greenleaf:

> For though it is a maxim of law, as well as the dictate of charity, that every person is to be presumed innocent until he is proved to be guilty; yet it is a rule equally sound that every sane person must be supposed to intend that which is the ordinary and natural consequences of his own purposed act. Therefore, "where an act, *in itself indifferent*, becomes criminal if done" with a particular intent, there the intent must be proved and found; but where the act is *in itself unlawful* the proof of justification or excuse lies on the defendant; and, in failure thereof, the law implies a criminal intent.

Was the act unlawful? If your statute was valid it clearly was, for your statute says, in the sixth section:

> That every removal, appointment, or employment made, had or exercised contrary to the provisions of this act, and the making, signing, sealing, countersigning, or issuing of any commission or letter of authority for or in respect to any such appointment or employment, shall be deemed, and are hereby declared to be, high misdemeanors; and upon trial and con-

Digitized by Google

viction thereof, every person guilty thereof shall be punished by a fine not exceeding $10,000 or by imprisonment not exceeding five years, or both said punishments, in the discretion of the court.

Senators, is it an unlawful act within the text of Greenleaf? That surely is an unlawful act the doing of which is by the express law of the people declared to be a penal offence punishable by fine and imprisonment in the penitentiary. What answer do the gentlemen make? How do they attempt to escape from this provision of the law? They say, and it did amaze me, the President attempted to remove the Secretary of War, but he did not succeed. Are we to be told that the man who makes an attempt upon your life here in the District of Columbia, although if you are to search never so closely the statutes of the United States you would not find the offence definitely defined and its punishment prescribed by statute—are we to be told that because he did not succeed in murdering you outright he must go acquit, to try what success he may have on another day and in another place in accomplishing his purpose? Senators, I have notified you already of that which you do know, that your act of 1801, as well as your act of 1831, declares that all offences indictable at the common law committed within the District of Columbia shall be crimes or misdemeanors, according to their grade, and shall be indictable and punishable in the District of Columbia in your own courts.

I listened to the learned gentleman from New York the other day upon this point, and for the life of me (and I beg his pardon for saying it) I could not understand what induced the gentleman to venture upon the intimation that there was any such thing possible as a defence for the President if they admit the unlawful attempt to violate this law by admitting the order to be an unlawful attempt. I say, with all respect to the gentlemen, that it has been settled during the current century and longer, by the highest courts of this country and of England, that an attempt to commit a misdemeanor, whether the misdemeanor be one at common law or a misdemeanor by statute law, is itself a misdemeanor; and in support of that I read from 1 Russell:

An attempt to commit a statutable misdemeanor is as much indictable as an attempt to commit a common law misdemeanor; for when an offence is made a misdemeanor by statute, it is made so for all purposes. And the general rule is, that "an attempt to commit a misdemeanor is a misdemeanor, whether the offence is created by statute, or was an offence at common law." (Russell on Crimes, p. 84.)

I should like to see some authoritative view brought into this Senate to contradict that rule. It is common law as well as common sense. But, further, what use is there for raising a question of this nature when the further provision of the statute is that—

The making, signing, sealing, countersigning, or issuing of any commission or letter of authority for or in respect to any such appointment or employment shall be deemed, and are hereby declared to be, high misdemeanors.

The issuing of the order, the issuing of the letter of authority of and concerning the appointment is, by the express words of your law, made a high misdemeanor. Who is there to challenge this, here or anywhere? What answer has been made to it? What answer can be made to it? None, senators, none. When the words of a statute are plain there is an end to all controversy; and in this, as in every other part of this discussion touching the written laws of the land, I stand upon that accepted canon of construction cited by the Attorney General in his defence of the President last week, when he said "effect must be given to every word of the written law." Let effect be given to the words that "every letter of authority" shall be a high misdemeanor. Let effect be given to the statute that every commission issued and every order made effecting or referring to the matter of the employment in the office shall be a high misdemeanor. Let the Senate pass upon it. I have nothing further to say about it. I have discharged my duty, my whole duty.

The question now remains, and the only question that now remains, *is this*

tenure-of-office act valid? If it is, whatever gentlemen may say about the first article, there is no man but knows that under the second and third and eighth articles, by issuing the letter of authority in the very words of this statute, and in the very light of his own letter, which I have read just now in the hearing of the Senate, as to his intent and purpose, he is guilty of a high misdemeanor. No matter what may be said about the first article, he did issue the letter of authority which is set forth in the second article, and he has written it down in his letter of the 10th of February, that his object and purpose was to violate that very law, and to prevent the Secretary of War from resuming the functions of the office, although the law says he shall forthwith resume the functions of the office in case the Senate shall non-concur in his suspension. And yet gentlemen haggle here about this question as if it were an open question. It is not an open question. It is a settled, closed question at this hour in the judgment of every enlightened, intelligent man who has had access to your record in this country, and it is useless and worse than useless to wase time upon it.

The question now is: Is your act valid, is it constitutional? Senators, I ought to consider that question closed; I ought to assume that the Congress of the United States who passed the act will abide by it. They acted upon the responsibility of their oaths. They acted under the limitations of the Constitution. The 39th Congress, not unmindful, I trust, of their obligations, and not incapable of duly considering the grants and limitations of the Constitution, passed this law because, first, they deemed that it was authorized by the Constitution, and because, second, they deemed that its enactment was necessary—that is the word of the Constitution itself—to the public welfare and the public interest. They sent it, in obedience to the requirements of the Constitution, to the President for his approval. The President, in the exercise of his power and his right under the Constitution, considered it and returned it to the house in which it had originated with his objections. When he had done this we claim, and, in claiming it, we stand upon the traditions of the country, that all his power over the question of the validity of this law terminated. He returned it to the House with his objections. He suggested that it was unconstitutional. The Senate and the House reconsidered it, in obedience to the Constitution, in the light of the President's objections, and by a two-thirds vote under the obligation of their oaths re-enacted the bill into a law; and, in the words of the Constitution, it thereby became a law, a law for the President, and it will forever remain a law until it is repealed by the law-making power or reversed by the courts having jurisdiction.

And now, what takes place? These gentlemen come before the Senate with their answer and tell the Senate that it is unconstitutional. They ask the Senate, in other words, to change their record; ask to have this journal read hereafter at the opening of the court: "The people of the United States against the Senate and House of Representatives, charged with high crimes and misdemeanors in this, that in disregard of the Constitution, in disregard of their oath of office, they did enact a certain law entitled 'An act to regulate the tenure of certain civil offices' to the hurt and injury of the American people, and were thereby guilty of high crimes and misdemeanors in office." Senators, we have had our lessons here upon charity in the progress of this trial, but really it does seem to me that this would be a stretch of that charity which requires you to give away your coat. I never knew before that charity required you to make a voluntary surrender of your good name, of your character, your conscience, in order to accommodate this accused and guilty culprit, and say after all that it is not the President of the United States that is impeached, it is the Senate that is sitting in judgment upon him; and now we will accommodate this poor unfortunate by making a clean breast of it, and making a confession before gods and men that we violated our own oaths, that we violated the Constitution of

Digitized by Google

the country, in that we did enact into a law, despite the President's veto to the contrary, a certain act entitled "An act to regulate the tenure of certain civil offices," passed March 2, 1867!

When it comes to that, it is not for me to say what becomes of the Senate. There is a power to gibbet us all in eternal infamy for making up records of this kind deliberately to the injury of the rights of a whole people and to the dishonor and shame and disgrace of human nature itself. And yet the question is made here, and the truth is it had to be made, it is in the answer, that the law is unconstitutional. If the law be valid the President is guilty, and there is no escape for him. It is needful to make the issue, and having made it, it is needful that the Senate decide it. If they decide that the law is constitutional there is the end of it. They have decided it three times. They decided it when they first passed the law. They decided it when they re-enacted it over the President's veto. They decided it again, as it was their duty to decide it, when he sent his message to them on the 21st of February, 1868, telling them that he had violated and defied its provisions, that he had disregarded their action; it was their duty to decide it. The Senate need no apology, and I am sure will never offer any apology to any man in this life or to any set of men for what they did on that occasion. What! The President of the United States to deliberately violate the law of the United States, to disregard the solemn action of the Senate, to treat with contempt the notice that the Senate had served upon him in accordance with the law, and send a message to them, deliberately insulting them in their own chamber by telling them, in so many words, "I have received your notice; I know you have non-concurred in the suspension of the Secretary of War; I was willing to co-operate with you; and without regard to the law, without the slightest evidence that the Secretary of War was in any sense disqualified, without the slightest evidence that he was guilty of a misdemeanor or crime, as required by your statute, I suspended him, agreeing all the while, if you concurred with me, and thereby cast reproach and dishonor unjustly upon a faithful officer and violated as well your own oaths and the law of your country, well and good; I should stand with you; we would strike hands together."

But, sirs, you have seen fit to have regard to your oaths; you have seen fit to act in some sense up to the character of that grand man who illustrated the glory and dignity which sometimes is vouchsafed to this poor human nature of ours when he was asked to violate the most holy law by eating forbidden food, when he answered no. Well, seemingly do it, for surely they will put you to death. He answered again, no, for that would bring a stain and dishonor upon my gray hairs; take me to the torture; take me to the torture! The Senate, mindful of the obligations of their oaths, careless of the influence of power and position touching this question, when the message of the President came to them that he had deliberately violated your law and defiantly challenged you to make answer, did make answer, as it was your duty under your oaths and to that great people who commissioned you, "Sir, the thing which you have done is not warranted by the Constitution and laws of your country."

And this, senators, is my answer to this charge of hate in the prosecution of this impeachment. The representatives of the people, and all others who thought it worth while to notice my own official conduct touching this matter of impeachment, know well that I kept myself back, and endeavored to keep others back from rushing madly on to this conflict between the people and their President. The Senate, also acting in the same spirit, gave him this notice that he might retrace his steps and thereby save the institutions of the country the peril of this great shock. But no; it was needful that he should illustrate the old Pagan rule, "Whom the gods would destroy they first make mad."

I return to the question of the validity of this law, with the simple statement

Digitized by Google

that by the text of the Constitution, as I have already read it in the hearing of the Senate, it is provided that all appointments not otherwise provided for in the Constitution shall be made by and with the advice and consent of the Senate. It necessarily results, as Mr. Webster said, from this provision that the removing power is incident to the appointing power, unless otherwise provided by law. I have shown to the Senate that this removing power has never been otherwise exercised, from the 1st Congress to this hour, except in obedience to the express provisions of law; that the act of 1789 authorized the removal, that the act of 1795 authorized the temporary appointment. I add further, that I have argued in the presence of the Senate the effect of that provision of the Constitution that the President shall have power to fill up all vacancies which may happen during the recess of the Senate by granting commissions, which shall expire at the end of their next session, which, by necessary implication, means, and means nothing else, that he shall not create vacancies, without the authority of law, during the session of the Senate, and fill them at his pleasure without the consent of the Senate.

I have but one word further to add in support of the constitutionality of this law, and that is the express grant of the Constitution itself that the Congress shall have power "to make all laws which shall be necessary and proper," interpreting that word "proper" in the language of Marshall himself, in the great case of McColloch *vs.* Maryland, as being "adapted to," "shall have power to make all laws necessary and adapted to carrying into execution" "all" the "powers vested by this Constitution in the government of the United States or in any department or officer thereof." I think that grant of power is plain enough, and clear enough, to sanction the enactment of the tenure-of-office act; even admitting, if you please, that the power of removal and appointment, subject to the law of Congress, was conferred upon the President, which I deny, there is a grant of power that the Congress may pass all laws necessary and proper to regulate every power granted under this Constitution to every officer thereof. Is the President of the United States "an officer thereof?" I do not stop, senators, to argue the proposition further, but refer to an authority in 4 Webster's Works, 199, in which he recognized the same principle, most distinctly and clearly, that it is competent for the Congress of the United States to regulate this very question by law; and I add that the Congresses of the United States, from the 1st Congress to this hour, have approved the same thing by their legislation. That is all there is of that question. The law, I take it, is valid enough, and will remain valid forever, if its validity is to depend upon a judgment of reversal by the Senate that twice passed it under the solemn obligations of their oaths.

Something has been said here about a continued practice of eighty years. I have said enough on that subject, I think, to answer, fully answer, all that was said by the learned counsel for the President. I have shown that the act of 1789, by the interpretation and construction of one of the first men of America, Mr. Webster, did really by direct operation separate the removing from the appointing power and was itself a grant of power. I have said already, and have shown to the Senate, that the Constitution confers that power upon the Senate. Then there is no practice of eighty years adverse to this tenure-of-office act; so that I need say no further word on that subject, but leave it there.

All the acts from 1789 down to 1867 bear witness of one thing, and that is that the Congress of the United States have full power under the Constitution by law to confer upon the President the power of temporary or permanent removal or withhold it. That is precisely what they establish, and I stand upon it here as a representative of the people, prosecuting for the people these articles of impeachment, and declare here, this day, upon my conscience, and risk what reputation I may have in this world upon the assertion that the whole legislation of this country from 1789 to 1867 together, bears one common testimony to

Digitized by Google

the power of the Congress to regulate by law the removal and appointment of all officers within the general limitation of the Constitution of the supervisory power of the Senate. Why, the act of 1789, as Webster said, conferred upon the President the power of removal and thereby separated it from the power of appointment, of which it was a necessary incident and subjected this country to great abuses. The act of 1795, on the other hand, gave him power to make certain temporary appointments, limited, however, to six months for any one vacancy, thereby showing that it was no power under the Constitution and beyond the limitations and the restrictions of law.

The act of 1863 limited and restricted him to certain heads of departments and other officials of the government, as did also the act of 1789. If the President of the United States has this power by force of the Constitution, independent of law, pray tell me, senators, how it comes that the act of 1789 limited and restricted him to the chief clerk of that department, how it comes that the act of 1795 limited and restricted him to the period of six months only, for any one vacancy? If, as is claimed in this answer, he had the power of indefinite removal, and therefore the power of indefinite appointment, how comes it that the act of 1863 limited him to certain officials of the government and did not leave him at liberty to choose from the body of the people? I waste no further words on the subject. I consider the question fully closed and settled. All the legislation shows the power of the President to be subject to the limitations of the Constitution and subject to the further limitation of such enactments as the Congress may make, which enactments must bind him, as they bind everybody else, whether he approves them or not, until they shall have been duly reversed by the courts of the United States or repealed by the people's representatives in Congress assembled.

I may be pardoned, senators, having gone over hastily in this way the general facts in this case, for saying that the President's declarations are here interposed to shield him from his manifest guilt under the first three, the eighth, and the eleventh articles in this matter of removal and appointment during the session of the Senate. These declarations of the President are declarations after the fact. Most of them were excluded by the Senate, and most properly, in my judgment, excluded by the Senate. Some of them were admitted. I do not regret it. It shows that the Senate were willing even to resolve a doubtful question, or if it were not a doubtful question, to relax the rules of evidence in the exercise of their discretion, to see what explanation the Chief Executive could possibly give for his conduct, and allow him, contrary to all the rules of evidence, to be a witness in his own case, and that, too, not under the obligations of an oath. They introduced his declarations. They amount to no more than that to which I have referred already, that it was his purpose in violating the law to really test its validity in the courts, whenever, of course, he got ready to test it. That is all there was of them. There was nothing more of the declarations of the President as introduced by him in this trial. If that can be any possible excuse in the light of the fact to which I have before referred, that it was simply impossible for him to test the question in the courts in the form in which he himself put the question, there is an end of it. There is no use in pressing the matter any further, and I dismiss it with this additional remark, that he had no right, no colorable right, to challenge in that way the laws of a free people and suspend their execution until it should suit his pleasure to test their validity in the courts of justice.

But, senators, what more is there? He is charged here with conspiracy, and conspiracy is proved upon him by his letter of authority to Thomas and Thomas's acceptance under his own hand, both of which papers are before the Senate and in evidence. What is a conspiracy? A simple agreement between two or more persons to do an unlawful act, either with or without force, and the offence is complete the moment the agreement is entered into. That is to say, the moment

Digitized by Google

the mind of each assents to the guilty proposition to do an unlawful act, conspiracy is complete, and the parties are then and there guilty of a misdemeanor. It is a misdemeanor at the common law; it is a misdemeanor under the act of 1801; it is a misdemeanor under the act of 1831. It is a misdemeanor for which Andrew Johnson and Lorenzo Thomas are both indictable after this proceeding shall have closed; and it is a misdemeanor an indictment for which would be worth no more than the paper upon which it would be written until after this impeachment shall have closed and the Senate shall have pronounced the righteous judgment of guilty upon this offender of your laws, and for a very simple reason.

Senators, it is written in your Constitution that the President shall have power to grant reprieves and pardons for all—not *some*, but *all*—offences against the United States save in cases of impeachment. Indict Lorenzo Thomas to-morrow for his misdemeanor in that he conspired with Andrew Johnson to violate the law of the United States, in that he conspired with him to prevent, contrary to the "act to regulate the tenure of certain civil offices," Edwin M. Stanton from forthwith resuming the functions of his office upon the refusal of the Senate to concur in his suspension; and all that is wanting is for Andrew Johnson, with a mere wave of his hand, to issue a general pardon and dismiss the proceeding. I say again this is the tribunal of the people in which to try this great offender, this violator of oaths, of the Constitution, and of the laws.

Say the gentlemen, that is a very little offence; you might forgive that. The pardoning power does not happen to be conferred upon the Senate, and this tender and tearful appeal to the Senate on the ground of its being a little thing does not amount to very much. But, say the gentlemen, you have also charged him, under the act of 1861, with having conspired with Lorenzo Thomas, in the one count by force, in the other by threat and intimidation, to work out the same result, to prevent the execution of the laws and to violate their provisions. So we have, and we say that he is clearly proved guilty. How? By the confession chiefly of his co-conspirator. I have said the conspiracy is established by the written letter of authority and by the written acceptance of that letter of authority by Thomas. The conspiracy is established; and the conspiracy being established, I say that the declarations of his co-conspirator, made in the prosecution of the common design, are evidence against them both. And in support of that I refer the Senate to the case of the United States *vs.* Cole, 5 McLane's United States Circuit Court Reports:

> Where *prima facie* evidence has been given of a combination the acts or confessions of one are evidence against all. * * * It is reasonable where a body of men assume the attribute of individuality, whether for commercial business or for the commission of a crime, that the association should be bound by the acts of one of its members in carrying out the design.

You have the testimony of the declaration of this co-conspirator. He was conversing with friends; and it is for the Senate to determine whether he was not invoking the aid of friends in the prosecution of this common design. He told one friend that in two or three days he would kick the Secretary of War out; he told that other friend, Dr. Burleigh, who visited his house, to "come up on to-morrow morning, and if the doors are closed I will break them down." It was inviting a friend of his own to be there, in case of need to render him assistance and co-operation. There is something further, however, in this evidence of the purpose to employ force. In the examination (page 440 Impeachment Record) of this co-conspirator he is asked in regard to the papers of the department:

> Did you afterwards hit upon a scheme by which you might get possession of the papers without getting possession of the building?
> A. Yes, sir.
> Q. And that was by getting an order of General Grant?
> A. Yes——

Digitized by Google

Mr. EVARTS. He has not stated what it was.

By Mr. Manager BUTLER:

Q. Did you write such an order?
A. I wrote the draught of a letter; yes, and gave it to the President.
Q. Did you sign it?
A. I signed it.
Q. And left it with the President for his——
A. For his consideration.
Q. When was that?
A. The letter is dated the 10th of March.

After he was impeached, defying the power of the people to check him, he left the letter with the President for his consideration.

Q. That was the morning after you told Karsner you were going to kick him out?
A That was the morning after.
Q. And you carried that letter?
A. I had spoken to the President before about that matter.
Q. You did not think any bloodshed would come of that letter?
A. None at all.
Q. And the letter was to be issued as your order?
A. Yes.
Q. And before you issued that order, took that way to get hold of the mails or papers you thought it necessary to consult the President?
A. I gave that to him for his consideration.
Q. You did think it necessary to consult the President, did you not?
A. I had consulted him before.

Further on he says:

Q. They were published and notorious, were they not? Have you acted as Secretary of War *ad interim* since?
A. I have given no order whatever.
Q. That may not be all the action of a Secretary of War *ad interim*. Have you acted as Secretary of War *ad interim*?
A. I have, in other respects.
Q. What other respects?
A. I have attended the councils.
Q. Cabinet meetings, you mean.
A. Cabinet meetings.
Q. Have you been recognized as Secretary of War *ad interim*?
A. I have been.
Q. Continually?
A. Continually.
Q. By the President and the other members of the cabinet?
A. Yes, sir.
Q. Down to the present hour?
A. Down to the present hour.
Q. All your action as Secretary of War *ad interim* has been confined, has it not, to attending cabinet meetings?
A. It has. I have given no order whatever.
Q. Have you given any advice to the President? You being one of his constitutional advisers, have you given him advice as to the duties of his office or the duties of yours?
A. The ordinary conversation that takes place at meetings of that kind. I do not know that I gave him any particular advice.
Q. Did he ever call you in?
A. He has asked me if I had any business to lay before him several times.
Q. You never had any?
A. I never had any except the case of the note I proposed sending to General Grant.
Q. I want to inquire a little further about that. He did not agree to send that notice, did he?
A. When I first spoke to him about it I told him what the mode of getting possession of the papers was, to write a note to General Grant to issue an order calling upon the heads of bureaus, as they were military men, to send to me communications designed either for the President or the Secretary of War. That was one mode.
Q. What was the other mode you suggested?
A. The other mode would be to require the mails to be delivered from the city post office.
Q. And he told you to draw the order?
A. No; he did not.
Q. But you did?
A. I did it of myself, after having this talk.

Digitized by Google

Q. Did he agree to that suggestion of yours?
A. He said he would take it and put it on his own desk. He would think about it.
Q. When was that?
A. On the 10th.
Q. Has it been lying there ever since, as far as you know?
A. It has been.
Q. He has been considering ever since on that subject?
A. I do not know what he has been doing.
Q. Has he ever spoken to you or you to him about that order since?
A. Yes.
Q. When?
A. I may have mentioned it one day at the council, and he said we had better let the matter rest until after the impeachment.

A notice to the Senate that these two confederates and conspirators have been deliberately conferring together about violating, not simply your tenure-of-office act, but your act making appropriations for the army of 2d of March, 1867; that one of the conspirators has written out an order for the very purpose of violating the law, and the other conspirator, seeing the handwriting upon the wall, and apprehensive, after all, that the people may pronounce him guilty, concludes to whisper in the ear of his co-conspirator, "Let it rest until after the impeachment." Give him, senators, a letter of authority, and he is ready, then, to renew this contest and again sit in judicial judgment upon all your statutes, and say that he has deliberately settled down in the conviction that your law regulating the army, fixing the headquarters of its General in the capital, not removable without the consent of the Senate, does nevertheless impair, in the language of that argument made by Judge Curtis, certain rights conferred upon him by the Constitution, and by his profound judicial judgment he will come to the conclusion to set that aside, too, and order General Grant to California or to Oregon or to Maine, and defy you again to try him. Senators, I trust you will spare the people any such exhibition.

And now, senators, it has been my endeavor to finish all that I desire to say in this matter. I hope, I know really, that I could finish all that I have to say, if I were in possession of my strength, in the course of an hour or an hour and a half. It is now, however, past 4 o'clock, and if the Senate should be good enough to indulge me, I shall promise not to ask a recess to-morrow if it pleases Providence to bring me here to answer further in the case of the people against Andrew Johnson.

Mr. HOWARD. I move that the Senate, sitting for the trial of the impeachment, adjourn until to-morrow at 12 o'clock.

The motion was agreed to; and the Senate, sitting for the trial of the impeachment, adjourned.

WEDNESDAY, *May* 6, 1868.

The Chief Justice of the United States took the chair.

The usual proclamation having been made by the Sergeant-at-arms,

The managers of the impeachment on the part of the House of Representatives, and Messrs. Evarts, Groesbeck, and Nelson, of counsel for the respondent, appeared and took the seats assigned to them respectively.

The members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

The journal of yesterday's proceedings of the Senate, sitting for the trial of the impeachment, was read.

The CHIEF JUSTICE. Senators will please give their attention. Mr. Manager Bingham will resume the argument in behalf of the House of Representatives.

Mr. Manager BINGHAM. Mr. President and Senators, yesterday I had said nearly all that I desired to say touching the question of the power of the President under the legislation of the United States to control the executive offices of this government. To the better understanding, however, of my argument, Senators, I desire to read the provisions of the several statutes, and to insist, in the presence of the Senate, that upon the law, as read by the counsel for the President on this trial, the acts of 1789 and of 1795 have ceased to be law, and that the President can no more exercise authority under them to-day than can the humblest citizen of the land. I desire also, Senators, in reading these statutes, to reaffirm the position which I assumed yesterday, with perfect confidence that it would command the judgment and assent of every senator, to wit: that the whole legislation of this country, from the first Congress in 1789 to this hour, bears a uniform witness to the fact that the President of the United States has no control over the executive offices of this government, except such control as is given by the text of the Constitution which I read yesterday, to fill up such vacancies as may occur during the recess of the Senate, with limited commissions to expire with their next session, or such power as is given to him by express authority of law. I care nothing for the conflicting speeches of Representatives in the first Congress on this question. The statutes of the country conclude them and conclude us, and conclude, as well, every officer of this government from the Executive down.

What, then, senators, is the provision of this act of 1789? I may be allowed, in passing, to remark—for I shall only read one of them—that the act establishing the Department for Foreign Affairs contains precisely the same provision, word for word, as the act of the same session establishing the Department of War. The provision of the act of 1789 is this:

SECTION 2. That there shall be in the said department an inferior officer, to be appointed by the said principal officer, and to be employed therein as he shall deem proper, and to be called the chief clerk of the Department of Foreign Affairs, and who, whenever the said principal officer shall be removed from office by the President of the United States—

which I showed you yesterday, upon the authority of Webster, was a grant of power without which the President could not have removed him—

or in any other case of vacancy, shall, during such vacancy, have the charge and custody of all records, books, and papers appertaining to the said department.

Standing upon that statute, Senators, and standing upon the continued and unbroken practice of eighty years, I want to know, as I inquired yesterday, what practice shows that this vacancy thus created by authority of the act of 1789 could be filled during the session of the Senate by the appointment of a new head to that department without the consent of the Senate as prescribed in the Constitution. No precedent whatever has been furnished.

I said yesterday all that I have occasion to say touching the case of Pickering. I remarked yesterday, what I but repeat in passing, without delaying the Senate, that the vacancy was not filled without the consent of the Senate, and that is the end of this unbroken current of decisions upon which the gentlemen rely to sustain this assumption of power on the part of the accused President. It cannot avail them. The act of 1789 excludes the conclusion which they have attempted to impress upon the minds of the Senate in defence of the President. The law restricts him to the chief clerk. If he had the power to fill the vacancy, why this restriction? Could he override that law? Could he commit the custody of the papers and records of that department, on the act of 1789, to any human being on earth during that vacancy but the chief clerk, who was not appointed by him, but by the head of the department? There stands the law; and in the light of that law the defence made by the President turns to dust and ashes in the presence of the Senate. I say no more upon that point; reminding the Senate that the act of 1789, establishing the War Department, contains precisely the same provision and imposes pre-

cisely the same limitation, giving him no power to fill the vacancy by appointment during the session of the Senate.

I pass now to the act of 1795. The act of 1792 is obsolete; has been superseded, and was substantially the same as the act of 1795; and what I have to say, therefore, of the act of 1795, applies as well to the act of 1792. I read from 1 Statutes at Large, page 415:

In case of vacancy in the office of Secretary of State, Secretary of the Treasury, or of the Secretary of the Department of War, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed or such vacancy be filled: *Provided*, That no one vacancy shall be supplied in manner aforesaid for a longer term than six months.

There stood the act of 1789, unrepealed up to 1795, I admit, expressly authorizing the President to create the vacancy, but restricting him as to the control of the department after it was created to the chief clerk of the department. That is superseded by the act of 1795, in so far as the appointment is concerned, by expressly providing and giving him the additional power:

It shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed.

It was a grant of power to him. No grant of power could be more plainly written. What is the necessity of this grant if the defence made here by the President, as stated in his answer and read by me to the Senate yesterday, be true—that the power is in him by virtue of the Constitution? If it be, I ask to-day, as I asked yesterday, how comes it that Congress restricted this constitutional power to appointments not to exceed six months for any one vacancy? That is the language of the statute. Am I to argue with senators that this term "any one vacancy" excludes the conclusion that the President could, upon his own motion, multiply vacancies *ad infinitum* by creating another at the end of the six months and making a new appointment? Senators, there is no unbroken current of decisions to support any such assumption.

There is no action of the executive department at any time to support it or give color to it, and there I leave it.

I ask the attention of senators now to the provisions of the act of 1863, which also affirms the absolute control of the legislative departments over this whole question of removal and appointments, save and except always the express provision of the Constitution—which, of course, the legislature cannot take away—that the President may fill up vacancies which may happen during the recess of the Senate by limited commissions, to expire at the end of their next session. The act of 1863 is in these words:

That in case of the death, resignation, absence from the seat of government, or sickness of the head of any executive department of the government, or of any officer of either of the said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize the head of any other executive department or other officer in either of said departments whose appointment is vested in the President, at his discretion, to perform the duties of the said respective offices until a successor be appointed or until such absence or inability by sickness shall cease: *Provided*, That no vacancy shall be supplied in manner aforesaid for a longer term than six months.

Senators, what man can read that statute without being forced to the conclusion that the legislature thereby reaffirmed the power that they affirmed in 1789, the power that they affirmed in 1795, to control and regulate by law this asserted unlimited power of the Executive over either appointments or removals? Look at the statute. Is he permitted to choose at large from the body of the community to fill temporarily these vacancies? Not at all.

It shall be lawful for the President of the United States, in case he shall think it necessary,

Digitized by Google

to authorize *the head of any other executive department, or other officer of either of said departments whose appointment is vested in the President*--

that is, the inferior officers—

at his discretion, to perform the duties of the said respective offices until a successor be appointed.

He is restricted by the very terms of the statute to the heads of departments or to such inferior officers of the several departments as are by law subject to his own appointment, and by that act he can appoint no other human being. There is the law; and yet gentlemen stand here and say that the act of 1789 and the act of 1795 were not repealed, when they read the authority themselves to show that when two statutes are repugnant and irreconcilable the last must control and works the repeal of the first. Here is the President by this act restricted expressly to the heads of departments and to the inferior officers of departments subject to his appointment under law, and he shall appoint no one else. Was that the provision of 1795? Do these statutes stand together? Are they by any possibility reconcilable? For the purpose of my argument it is not needful that I should insist upon the repeal of the act of 1795 any further than it relates to the vacancies which arise from the cases enumerated in the act of 1863. The act of 1863 is a reassertion of the power of the legislature to control this whole question; and that is the unbroken current of decisions from the first Congress down to this day, that the President can exercise no control over this question except by authority of law and subject to the express requirements of law.

This brings me, then, senators, to the act of 1867, to which I referred yesterday, and which I refer to now to-day in this connection for the purpose of completing this argument and leaving every man without excuse upon this question as to the limitations imposed by law upon the President of the United States, touching this matter of appointment and removal of the heads of departments, and of all other officers whose appointment is, under the Constitution, by and with the advice and consent of the Senate; and my chief object in referring again this morning to the act of 1867 is to show what I am sure must have occurred to senators already, rather to perfect my own argument than to suggest any new thought to them, that by every rule of interpretation, that by every letter and word of law read in the conduct of this argument on behalf of the President by his counsel, the act of 1867, by necessary implication, beyond the shadow of a doubt, repeals the acts of 1789 and of 1795, and leaves the President of the United States subject to the requirements of this law as to all that class of officials. The language of this law is:

That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate—

that is, all past appointments at the time of the passage of this law—

and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is, and shall be, entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided.

How appointed? "In like manner appointed," by and with the advice and consent of the Senate, and duly qualified and commissioned under such appointment. All present officials shall hold these offices. What becomes of this grant of power in the act of 1789 to the President to remove? What becomes of this grant of power in the act of 1795 to make temporary appointments for six months? What becomes of the provision of the act of 1863 which authorized him to fill these vacancies with the heads of departments or by inferior officers for a period not exceeding six months? They all go by the board. There stands the provision of the statute, which no man can get away from, concluding this whole question:

That every person holding any civil office, * * * * * by and with the advice and consent of the Senate, * * * * * shall be

Digitized by Google

entitled to hold such office until a successor shall have been in like manner appointed and duly qualified.

Nothing could be plainer. There is no room for any controversy about it. There is not an intelligent man in America that will challenge it for a moment. "Every person holding" the office must include all persons holding the office. He shall continue to hold it—so the statute says—until a successor shall, in like manner, that is to say, by and with the advice and consent of the Senate, be not only appointed, but duly qualified. What room is there here, senators, for any further controversy in this matter? None whatever.

I referred yesterday to the proviso. I asked the attention of senators yesterday to the fact that the elaborate argument of Mr. Curtis on behalf of the accused declares in words, as you will find it recorded in the report of the case, that the present heads of departments appointed by Mr. Lincoln are not by any express words whatever within the proviso. He not only made the statement in manner and form as I now reiterate it in the hearing of the Senate, but he proceeded to argue to the Senate to show that they were not even by implication within the proviso. And so his argument stands reported to this hour; and, so far as I observed, really uncontradicted by anything said afterward by any of his associates; but if they did contradict it, if they did depart from it, if they did differ with him in judgment about it, they are entitled to the benefit of the difference. I do not desire to deny them the benefit of it. I only wish to say that it cannot avail them. I only wish to say in the hearing of senators that the interpretation put upon that proviso by the opening counsel for the President, declaring that it did not extend to nor embrace the existing appointments of the heads of departments under Mr. Lincoln, is an admission that Mr. Stanton was entitled to hold his office until removed by and with the advice and consent of the Senate. The reason given by Mr. Curtis was that there are no express words embracing the heads of departments appointed by Mr. Lincoln. The further reason given by Mr. Curtis was that there is nothing which by necessary implication brings them within the operation of the proviso. If they be not within the operation of the proviso, they are, by the very words of the statute, within the body of the act. The counsel who followed him for the President admitted that the offices were within the body of the act. The persons holding the offices, by the very words of the act "every person," are within the body of the act, and they are to retain the office, unless suspended for the special reasons named in the second section, by the express terms of the act, until a successor shall be, in like manner, appointed by and with the advice and consent of the Senate and shall have been duly qualified.

But I return to the proviso. The proviso is:

Provided, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

This proviso manifestly, in the last clause of it, stands with the general provisions of the first clause of the section which I have read, that they are at any time subject to removal by and with the advice and consent of the Senate. The residue of the proviso is to limit the tenure of office of the heads of these several departments appointed by and with the advice and consent of the Senate, by this limitation, that one month after the expiration of the term of the President by whom they were appointed, their office shall expire by mere operation of law, without the intervention of the Senate, without the intervention of the President, without the intervention of anybody. It was said here, very properly, by the Attorney General, that effect must be given to every word in a written statute. It is the law. Effect must be given to it and such an effect as will carry out the intent of the law itself. Give effect, Senators, if you please, to the words "during the term of the President and for one month thereafter." Give

effect to the words "the term of the President," if you please. The Constitution employs this phrase "term of the President." It declares that the President shall hold his office during the term of four years. It is the only Presidential term known to the Constitution. The act of March 1, 1792, reaffirms the same principle by law. I read from 1 Statutes at Large, page 241:

That the term of four years, for which a President and Vice-President shall be elected, shall in all cases commence on the 4th day of March next succeeding the day on which the votes of the electors shall have been given.

After making provision for an election in certain contingencies, when a vacancy shall have arisen in the office both of President and Vice-President of the United States, the statute follows it up with the same words, that the term shall commence on the 4th of March next after the election or the counting of the votes. The provision of the Constitution throws some light upon the subject:

In case of the removal of the President from office, or of his death, resignation or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President; and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

In the light of these provisions of the Constitution, and of this provision of the act of 1792, is it not apparent to the mind of every man within the hearing of my voice that the presidential term named and referred to in the act of 1867 is the constitutional term of four years? It must be so. It must be the term authorized by the Constitution and the laws, for there is no other "term." The position assumed here is that Andrew Johnson has a term answering to the provisions of the Constitution, of the act of 1792 and of the act of 1867, both of which employ the same word—the term of four years under the Constitution. Apply this provision of the Constitution which I have just read, that in the event of the inability of the President of the United States to execute the duties of the office the Vice-President shall execute the duties of the office until such disability be removed. That is the language of the Constitution. If the President of the United States elected by the people, and therefore possessed of a constitutional term, and the only person who ever can have a constitutional term while the Constitution remains as it is, shall be overtaken with sickness, and by delirium, if you please, rendered utterly incapable, in the language of the Constitution, of discharging the duties of the office, and his inability continues for the period of four consecutive months, is the Senate to be told that the Vice-President, upon whom the duties of the office by this provision devolve, by reason of the construction imposed here upon this statute or attempted to be put upon it by the counsel, is to be said to have a term within the meaning of this law, and therefore by operation of the statute, within one month after the disability arose against the President by reason of his incapacity, every executive office by operation of law became vacant; and are you to follow it to the absurd and ridiculous conclusion when, in the language of the Constitution, the disability shall be removed and the President restored to office, the offices filled with the advice and consent of the Senate by the Vice-President, upon whom the office in the mean time devolved—for by the terms of the Constitution your President disabled was civilly dead; you had but the one President, and that was the Vice-President, during the four months—on account of vacancies arising by operation of law one month after the office was devolved upon him by the Constitution by reason of the inability of the President, are to become vacant one month after the expiration of this four months' term and the return of the disabled President to his office by reason, in the language of the Constitution, of the removal of his disability.

It will not do. He had no term. No effect is given to the words of your statutes in that way; and more than that, senators, these learned and astute

Digitized by Google

counsel knew right well that they changed in their own minds, and changed by the words of their own argument, the very language of the statute, so that it should have read to accomplish their purposes: "that the office shall expire within one month after the end of the term *in which* they may have been appointed," not "in one month after the end of the term of the President *by whom* appointed," as the statute does read; but their logic rests upon the assumption that the statute contains the words which it does not contain, "that their office shall expire within one month after the term in which they may have been appointed."

Concede that, change the law in that way in order to accommodate this guilty man, and I will admit that you arrive at this conclusion, and that is about as absurd as the other, giving their construction to the law, changing its language from what it is, "that the office shall expire in one month after the term of the President *by whom* appointed," so that it shall read "after the end of one month from the end of the term *in which* they were appointed," and it results that ever since the 4th day of April, 1865, the people of the United States have been without a constitutional or lawful Secretary of State, without a constitutional Secretary of the Treasury, without a constitutional Secretary of the Navy, and without a constitutional Secretary of War, because, accepting the assumptions of these gentlemen, that by this word "term" in the statute is meant the term *in which* they were appointed, and not the term of the President *by whom* they were appointed, admit their premises, and no mortal man can escape the conclusion that the offices all became vacant on the 4th day of April, 1865. That is the position assumed by these gentlemen, for the simple reason that these four Secretaries were every one of them appointed by Mr. Lincoln in his first term, which first term expired on the 4th day of March, 1865.

Senators, that is not the meaning of your law. "The reason of the law is the life of the law." The reason of the law was simply this: that the Presidents elected by the people for a term—and no other Presidents have a term—should by operation of law, upon their coming to the office, be relieved, without any intervention of theirs, of all the several heads of departments who had been appointed by their predecessors. That is the meaning of the law. That is all there is of it. So far as this question of the right of an incoming President to a new cabinet is concerned, that is the extent of it. The word "term" determines it. Did that mean that a President re-elected for a term and thereby continuing in the office should be relieved from his own appointees by operation of law, and that, too, without his consent, and, if you please, against his wish? It never entered into the mind of a single member of the thirty-ninth Congress. I venture to say that no utterance of that sort is found recorded upon the debates touching this reform in the legislation of the country controlling executive appointments. What right had Mr. Lincoln to complain that the law did not vacate the heads of departments by its own operation for his benefit when he had filled them himself? The law was passed for no such purpose. I read the law literally as it is. They were to hold their offices, in the light of the reason of the law, during the entire term, if it should be eight years or twelve years or sixteen years, of the President *by whom* they were appointed, and their office was to expire within one month after the expiration of the term of the President by whom they were appointed, not within one month after the expiration of the term *in which* they were appointed.

That is my position in regard to this question. I have no doubt about its being the true construction of the law, neither had the accused; and I stated to the Senate yesterday my reasons for the assertion; I do not propose to repeat them to-day. The Senate did me the honor to listen and attend to my remarks on that subject, wherein the President, by every step he took until this impeachment was instituted, confessed that that was the operation of this law, and these heads of departments might avail themselves of it.

Digitized by Google

In the act of 1792 my attention is called to another provision of it, which I did not read, which shows the operation of this word "term" still more strongly than does the provision of the twelfth section, which I read. It is found in the tenth section of the act, which provides—

That whenever the offices of President and Vice-President shall both become vacant the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every State, and shall also cause the same to be published in at least one of the newspapers printed in each State, specifying that electors of the President of the United States shall be appointed or chosen in the several States within thirty-four days preceding the first Wednesday in December then next ensuing: *Provided*, There shall be the space of two months between the date of such notification and the said first Wednesday in December; but if there shall not be the space of two months between the date of such notification and the first Wednesday in December, and if the *term* for which the President and Vice-President last in office were elected shall not expire on the 3d day of March next ensuing, then the Secretary of State shall specify in the notification that the electors shall be appointed or chosen within thirty-four days preceding the first Wednesday in December in the year next ensuing, within which time the electors shall accordingly be appointed or chosen—

Showing that this term by the express provisions of the law is limited everywhere and intended to be limited everywhere within the meaning and sense of the Constitution. That being so there is no person who has a term but the President elected by the people. There is no person, therefore, whose appointment can, by any possibility, be within the provisions of this proviso but such a President, and in that case the Secretary of War and the other Secretaries of the various departments are under the operation of the statute within the proviso, so as to limit and determine their offices at the expiration of one month after the inauguration of a successor elected also to a term. It is the only construction which gives effect to all the words of the statute.

There is one other point in this matter, and I have done with it. The gentlemen give this proviso a retroactive operation in order to get along with their case, and, as I showed to the Senate, vacate the offices really by making the statute read as it does not read, that these officers are to go out of office one month after the expiration of the term in which they were appointed. In order to get up this construction they give a retrospective operation to the act, and make it take effect two years before its passage, and make it vacate the four executive departments I have named on the 4th day of April, 1865, when in point of fact the act was not passed until the 2d day of March, 1867. I have just this to remark on that subject, that it is a settled rule of the law that a retrospective operation can be given to no statute whatever without express words. The counsel for the President admits there are no express words in the proviso. That is the language of his own argument. I hold him to it, and I ask the Senate to pass upon it. I refer to the authority of Sedgwick on Statutory and Constitutional Law, page 190:

The effort of the English courts appears indeed always to be to give the statutes of that kingdom a prospective effect only, unless the language is so clear and imperative as not to admit of doubt.

* * * * * *

In this country the same opposition to giving statutes a retroactive effect has been manifested, and such is the general tenor of our decisions.

I have no doubt of it. The express language of the first clause of the law gives it a retrospective operation in one sense of the word, that is, it embraces every officer heretofore appointed by and with the advice and consent of the Senate, and by express language every officer hereafter to be so appointed. But this proviso, in the words of Mr. Curtis, contains no express language of that kind, and on the contrary, contains words which exclude the conclusion. I leave the question there. If Mr. Lincoln had lived I think every senator must agree that under this statute and within the reason of the law he could not have availed himself of the acts of 1789 and 1795 to remove a single head of department appointed by himself at any time during his term; and I do not care how often his term was renewed it was still the term and answered to the statute,

Digitized by Google

and he was still the President by whom these officers were appointed. And when his term expired, whether it was renewed twice or three or four times, when his term had expired the proviso *in futuro* took effect according to its own express language, and the offices by operation of law became vacated one month after the expiration of that term, and that term never does expire until the end of the time limited.

I have nothing further to say, Senators, upon this point. I think I have made it plain enough.

Having said this, allow me to remark in this connection that I think my honorable and learned friend from Ohio, [Mr. Groesbeck,] in his argument, spoke a little hastily and a little inconsiderately when he ventured to tell the Senate that unless Mr. Stanton was protected by the tenure-of-office act the first eight articles of impeachment must fail. Passing the question of removal, about which I have said enough, and more than enough, how can anybody agree with the honorable gentleman in his conclusion touching this matter of appointment? What man can say one word, one intelligible word in justification of the position that the act of 1867 did not sweep away every line and letter of the power of appointment conferred on the President by the acts of 1789 and 1795, as to every officer, appointable by and with the advice and consent of the Senate? I have asked the attention of the Senate before, and beg pardon for asking their attention again to the express words of the act which settle beyond controversy that point. Those words are:

That every person holding any civil office to which he has been appointed, by and with the advice and consent of the Senate, * * * * shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified.

The proviso, even allowing it to have the effect and operation which the gentlemen claim, only vacates the office; but it does not allow a successor to be appointed. There is not a word or syllable of that sort in it. The statute then stands declaring in substance that all vacancies in all these departments shall hereafter be filled only by and with the advice and consent of the Senate, save as it may be qualified by the third section; and what is that?

That the President shall have power to fill up all vacancies which may happen during the recess of the Senate, by reason of death or resignation, by granting commissions which shall expire at the end of their next session thereafter.

Showing additional reasons in support of my position that this statute necessarily repeals the acts of 1789 and 1795; that he may merely fill up during the recess; reiterating, in other words, the provision of the Constitution itself, but by law absolutely limiting and restricting his power of appointment to vacancies during the recess.

And if no appointment, by and with the advice and consent of the Senate, shall be made to such office so vacant or temporarily filled as aforesaid during such next session of the Senate, such office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until the same shall be filled by appointment thereto, by and with the advice and consent of the Senate.

Showing, as plainly as language can show, that the President's power over the premises is by law absolutely excluded.

And during such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office.

This throws you back upon the provisions of the act of 1863, but there is the express provision that the office shall remain in abeyance. Here is an appointment *ad interim* during the session of the Senate; here is an appointment *ad interim* to fill a vacancy which did not arise during the recess; here is an appointment *ad interim* to fill a vacancy created by an act of removal by himself; and what do the gentlemen say to it? Why it did not succeed, I answered yesterday, that the very words of the statute declare that the issuance

Digitized by Google

of the letter of authority shall be itself a high misdemeanor. That is answer enough.

But what else is said about this thing? The gentlemen come here to argue and put it in the answer of the President that the act of 1867 is unconstitutional and void. They have argued for hours to the Senate to assure them that no man can be guilty of a crime for the violation of an unconstitutional act, because it was no law that he violated. Why all this effort, Senators, by these learned counsel? Why this solemn averment in the answer of the President that the act of 1867 is unconstitutional and void, if, after all, there was no violation of its provisions; if, after all, it was no crime for him to make this *ad interim* appointment; if, after all, the acts of 1789 and 1795 remain in full force? Senators, I have no patience to pursue an argument of this sort. The position assumed is utterly inexcusable, utterly indefensible. Admitting Mr. Stanton, if you please, to be within the proviso; admitting that the proviso operated retrospectively; admitting that it vacated his office on the 4th day of April, 1865, as also the offices of Mr. Seward and Mr. Welles and Mr. McCulloch, leaving the republic without any lawful heads to those departments, accepting the absurd propositions of these gentlemen, and I ask you what answer is that to the second and third and eighth articles of accusation against the President that he committed a high crime and misdemeanor in office in that he issued a letter of authority contrary to the provisions of the sixth section? It is just no answer at all. I think the counsel must so understand it themselves.

What answer is that, also, I ask you, Senators, to the charges in the fourth, fifth, sixth, and seventh articles, that he entered into conspiracy with Thomas to prevent the execution of the law, and the averment in the eleventh article, which averments are divisible, as every lawyer knows, that he attempted by device and contrivance to prevent the execution of the law and to prevent the Secretary of War, Edwin M. Stanton, from resuming the functions of the office in obedience to the requirements of the act of 1867, which is also made a crime by your act of 1861 touching conspiracies, which is a crime at common law, as I read in the hearing of the Senate from 4 Bacon, and which crime at common law is made indictable by your act of 1801, and so affirmed by the decisions of the circuit court of your District, and by the decision of the Supreme Court of the United States, which I also read in the hearing of the Senate. I ask senators to consider whether, admitting that the Secretary of War had ceased to be entitled to the office, and was not to be protected in the office by operation of the law, the President must go acquit of these conspiracies into which he has entered and for the very purpose alleged, as confessed by himself in his letter which I read yesterday in the hearing of the Senate, and must go acquit of issuing this letter of authority in direct violation of the sixth section of the act.

There were other words uttered by the counsel here to show that there was a great deal more in this accusation than these gentlemen were willing to concede. The Senate will remember the language of Mr. Attorney General Stanbery, that this act was an odious, offensive, unconstitutional law, in that it attempted to impose penalties upon the Executive for discharging his executive functions, making it a crime or misdemeanor for him to exercise his undoubted discretionary power as claimed in his answer under the Constitution. He affirmed here with emphasis before the Senate that the law was made exclusively for the Executive. He forgot, Senators, that the fifth section of the act makes it apply to every man who participates with the Executive voluntarily in the breach of the law, and makes it a high misdemeanor for any person to accept any such appointment, &c., punishable by fine and imprisonment in the same measure precisely as the President himself is punishable.

I do not understand why this line of argument was entered upon, if my friend from Ohio was right in coming to the conclusion that there was noth-

ing in the conspiracy, that there was nothing in issuing the letter of authority in violation of the express penal provisions of the law, if Mr. Stanton was not protected by the law and could be rightfully removed. There is a great deal in it beyond that. The President had no right to make the appointment. That is the express language of your law. And for doing it he is liable to indictment whenever the Senate shall have executed its power over him by his removal from office. I explained yesterday how it is that he is not liable to prosecution before. Your Constitution provides that after the judgment shall be pronounced upon him of removal from office he may be held to answer by indictment for the crimes and misdemeanors whereof he has been impeached.

I referred yesterday to the fact disclosed in the evidence that the President has been pursuing these acts of usurpation in utter defiance and contempt of the people's power to control him since the impeachment was preferred against him. I read in the hearing of the Senate yesterday what was sworn to by Thomas as to the proposition to have an order made upon General Grant to compel the surrender of the papers of the Department of War to his Secretary *ad interim*. I read in the hearing of the Senate yesterday what Thomas swore to, that the President concluded to defer action upon the order which Thomas had written out and left lying upon the table awaiting the result of impeachment. And, Senators, something has transpired here upon the floor in the progress of this case which gives significance to this conversation between the President and Thomas, and that was the language of his veteran and intrepid friend from Tennessee, [Mr. Nelson,] who stood here unmoved while he uttered the strong words in the hearing of the Senate, that it was his own conviction, and it was also the conviction and opinion of the President himself, that the House of Representatives had no power under the Constitution to impeach him, no matter what he was guilty of, and that the Senate of the United States had no power under the Constitution as now organized to try him upon impeachment. We are very thankful that the President, of his grace, permits the Senate to sit quietly and deliberate on this question presented by articles of impeachment through the people's representatives.

But I ask senators to consider whether the President—for I observe the counsel did not intimate that the President was willing to abide the judgment—whether the President in this matter, after all, is not playing now the same *rôle* which he did play when he availed himself of the provisions of the tenure-of-office act to suspend Edwin M. Stanton from office and appoint a Secretary *ad interim* to await the action of the Senate; whether he is not playing the same *rôle* that he did play further when he availed himself of that act and notified the Senate of the suspension, together with the reasons and the evidence, agreeing to allow the Senate to deliberate, agreeing, if the Senate would concur in the suspension and make it absolute, to abide the judgment, but, nevertheless, reserving to himself that unlimited prerogative of executive power to defy the final judgment of the Senate if it was not in accord with his own. Is that the posture of this case? I think it had been well for the President of the United States, when he was informing us of his opinions on the subject through his learned counsel, to have gone a step further and to have informed us whether he would abide the judgment. He has let us know that we may sit and try him, as he let the Senate know before that they might sit and consider his reasons of suspension; but he let them know, when they came to a conclusion adverse to his own, that he would not abide their judgment.

He issued an order to Thomas. His counsel in the opening—and that is another significant fact in this case—said it could not be strictly called a military order; yet the habitual custom of the officers of the army to obey all the orders of a superior gave it in some sense the force of a military order, to Adjutant General Thomas, commanding him to take possession of the Department of War while the Senate was in session and without consulting it. It would

not surprise me, Senators, at all, if the President were to issue an order to-morrow to his Adjutant General to disperse the Senate, after sending such an utterance as this here by the lips of his counsel, that the Senate has no constitutional right to try him by reason, he says, of the absence of twenty senators, excluded by the action of this body, elected by ten States entitled to representation on this floor—a question which the President of the United States has no more right to decide or to meddle with than has the Czar of Russia. It is a piece of arrogance and impudence for the President of the United States to send to the Senate of the United States a message that they are not constitutionally constituted, and have no right to decide for themselves the qualification and election of their own members when it is the express provision of the Constitution that they shall have that power, and no man on earth shall challenge it.

I trust after this utterance of the President, which is substantially a declaration that you shall suspend judgment in the matter and defer to his will to a trial in the courts when it shall suit his convenience to inquire into the rights of the people to have their own laws executed, that the Senate of the United States will prove itself in the *finale* of this controversy with the President possessed of the grand heroic spirit of which the deputies of the nation were possessed in 1789 in France, when the king sent to its bar his order that the representatives of the people should disperse. Its illustrious president, Bailly, rising in his place, was hailed by the grand master with the inquiry, "You heard the king's order, sir?" "Yes, sir," and immediately turning to the deputies, said, "I cannot adjourn the Assembly until it has deliberated upon the order." "Is that your answer?" said the grand master. "Yes, sir, and it appears to me that the assembled nation cannot receive an order;" followed by the words of the great tribune of the people, Mirabeau, "Go tell those who sent you that bayonets can do nothing against the will of the nation." That, sir, is our answer to the arrogant words of the President that the Senate has no constitutional right to sit in judgment upon the high crimes and misdemeanors whereof he stands impeached this day by the representatives of the people.

I have said all that I have occasion to say touching the first eight articles preferred against the President. Having entered into this conspiracy, having issued this order for removal unlawfully, having issued this letter of authority unlawfully, it was necessary that the President should take another step in his guilty march; and accordingly he ventured, as conspirators always do, very cautiously upon the experiment of corrupting the conscience and staining the honor of the gallant soldier who was in command of the military forces of the District. He had an interview with him the day after he had issued this order, the day after he had issued this letter of authority, and said to him, "Sir, this act of 1867, making appropriations for the army, which requires all military orders to pass through the General of the army, whose headquarters are in the District of Columbia, and which declares also that any violation of its provisions shall be a high misdemeanor in office, is an unconstitutional law; it is an unconstitutional law, General, and it is not within the purview of your commission." It was simply a suggestion to the general that his commander-in-chief would stand by him in violating the law of the land. It was a suggestion to him that it would be a very great accommodation if the commandant of the military forces of the District of Columbia would receive his orders directly from the President and not from the General of the army.

It was a confession, Senators, by indirection, to be sure—that confession, however, which always syllables itself upon the tongue of guilt when guilt speaks at all—that General Grant, the hero of the century, who led your battalions to victory upon a hundred stricken fields, having vindicated the supremacy of the laws by wager of battle, would surely here in the capital be faithful to the obligations and the requirements of law, and refuse to strike hands with him. More than that; he had put it in writing and confessed, to which I asked the atten-

Digitized by Google

tion of Senators yesterday, to this effect: "You knew, General Grant, that my object and purpose was to violate and defy the law; you accepted the office to circumvent me." That is his language in his letter to Grant of the 10th of February. And yet the gentlemen say it is a miserable accusation! Is it? It is so miserable an accusation that in any other country than this, where the laws are enforced rigidly, it would cost an executive or military officer his head to suggest to any subordinate that he should violate a law, and a penal law at that, touching the movement of troops and military orders, and so plain that no mortal man could mistake its meaning. I say no more upon that point; I leave it with the Senate.

The act itself in its second section declares that a violation of its provisions shall be a high misdemeanor in office, punishable by fine and imprisonment in the penitentiary. The rule of law is that an attempt to commit a misdemeanor is itself a misdemeanor. It is the rule of the common law, and it is the rule of the District happily, and governs the President, and ought to govern him, and ought to govern everybody else within the District. I heard a sneer about this question, I thought, from one of the counsel, that it was limited to the District in its operations. If the legislation which is limited exclusively to the District is to be sneered at by counsel, what means the provision in the Constitution that the Congress shall have exclusive legislative power over the District? It is for the protection and defence of the nation. But it is not limited altogether to the District at last. The act of 1801 was limited to the District in applying the common-law rule, but the act which it supports is co-extensive with the republic. It is not necessary that the officer himself should be indictable in order to hold him impeachable. It is only necessary that the act he did, by the strict construction that is put upon this question by the counsel for the accused, was a crime or misdemeanor under the laws of the country. That it was such a crime and misdemeanor I have shown.

I leave article nine. I now consider article ten, about which a great deal has been said both by the opening counsel and by the concluding counsel. The President is in that article charged with an indictable offence, in this, that in the District of Columbia he uttered seditious words—I am stating now the substance and legal effect of the charge—seditious words tending to incite the people to revolt against the thirty-ninth Congress and to disregard their legislation, asserting in terms that it was no Congress, that it was a body "assuming to be a Congress," "hanging upon the verge of the government;" committing also acts of public indecency, which, as I showed to the Senate yesterday upon the authority which I read, is at common law an indictable misdemeanor, showing a purpose to violate the law himself and to encourage and incite others to violate the law. The language of the President was the language of sedition.

What did the counsel say about it? They referred you to the sedition act of 1798, which expired by its own limitation, and talked about its having been a very odious law. I do not know but they intimated that it was a very unconstitutional law. Pray what court of the United States ever so decided? There were prosecutions under it, but what court of the United States ever so decided? What commanding authority upon the Constitution ever ruled that the law was unconstitutional? I admit that no such law as that ought to be upon your statute-book, of general operation and application in this country, except in a day of national peril. That was a day of national peril. There was sedition in the land. The French minister was abroad in the republic, everywhere attempting to stir up the people to enter into combinations abroad hurtful and dangerous to the security of American institutions.

But I pass it. The gentlemen referred to Mr. Jefferson coming into power through his hostility to the sedition act of 1798; and he had no sooner got into power than he re-enacted it as to every officer and soldier of your army, and it

Digitized by Google

stands the law of your republic from that day to this. I read from the act of 1806:

> Any officer or soldier who shall use contemptuous or disrespectful words against the President of the United States, against the Vice-President thereof, against the Congress of the United States, or against the chief magistrate or legislature of any of the United States in which he may be quartered, if a commissioned officer, shall be cashiered or otherwise punished as a court-martial shall direct; if a non-commissioned officer or soldier, he shall suffer such punishment as shall be inflicted on him by the sentence of a court-martial.

Even unto death. That has been for more than 60 years the law of the republic. Using disrespectful language towards the President or using disrespectful language towards the Congress is an offence in an officer or soldier.

The gentlemen read from the Constitution in the hope, I suppose, to show that it was utterly impossible for the Congress of the United States to inflict pains and penalties by law for seditious utterances either by their President or anybody else. If it were competent for the Congress of 1806 to enact that law, it was equally competent for the Congress of 1798 to enact a sedition law; and by the act of 1801 these seditious utterances made in your District are indictable as misdemeanors, whether made by the President or anybody else, and especially in an official charged with the execution of the laws—for, as I read yesterday, a refusal to do an act required by the law of an officer is at common law indictable; the attempt to procure another or others to violate law, on the part of such officer, is also indictable; and, in general, seditious utterances by an executive officer at the common law always were indictable; that is to say, to incite the people to resistance to law or to incite the officers of the army to mutiny or to disregard law.

But, say counsel, this is his guaranteed right under the Constitution. The freedom of speech, says the gentleman, is not to be restricted by a law of Congress. How is that answered by this act of 1806, which subjects every soldier in your army and every officer in your army to court-martial for using disrespectful words of the President or of the Congress or of his superior officers? The freedom of speech guaranteed by the Constitution to all the people of the United States is that freedom of speech which respects, first, the right of the nation itself, which respects the supremacy of the nation's laws, and which finally respects the rights of every citizen of the republic. I believe in that freedom of speech. That is the freedom of speech to which the learned gentleman from New York referred when he quoted the words of Milton: "Giveme the liberty to know, to argue, and to utter freely according to conscience, above all liberties." That is the liberty which respects the rights of nations and the rights of individuals, which is called that virtuous liberty, a day, an hour of which is worth a whole eternity of bondage. That is our American constitutional liberty—the liberty in defence of which the noblest and the best of our race, men of whom the world was not worthy, have suffered hunger and thirst, cold and nakedness, the jeer of hate, the scowl of power, the gloom of the dungeon, the torture of the wheel, the agony of the fagot, the ignominy of the scaffold and the cross, and by their living and their dying glorified human nature and attested its claim to immortality. I stand, Senators, for that freedom of speech; but I stand against that freedom of speech which would disturb the peace of nations and disturb the repose of men even in their graves.

There is, Senators, but one other part of this case that I deem it my duty particularly further to discuss; and that is the allegation contained in the 11th article, which alleges specifically the attempt, not the accomplishment, of the acts, but rests on all the evidence, which applies to all the other articles preferred against this accused and guilty man—the attempts by devices to incite the people to resistance against their own Congress and its laws by declaring that it was a Congress of only part of the States; the attempt to prevent the ratification by the legislatures of the several States of the 14th article of amendment

Digitized by Google

preferred by the thirty-ninth Congress on the same ground that it was not the Congress of the nation and had no power to propose an article of amendment to the Constitution, a position asserted by him even in his messages to the Congress, reasserted in his speech; an attempt to prevent the execution of the tenure-of-office act; an attempt to prevent the execution of the act making appropriations for the support of the army and the Department of War, passed March 2, 1867; an attempt to defeat the operation and execution of the act for the more efficient government of the rebel States.

Why, said the learned gentleman from Ohio, [Mr. Groesbeck,] the evidence that we introduce to support this last averment of the 11th article, it appears, was a thing done by the President some months before the act was passed. The gentleman was entirely right in his dates, but he was altogether wrong in his conclusion. We introduced the telegram for no such purpose. We introduced the telegram in order to sustain that averment of the 11th article that he attempted to defeat the ratification of the 14th article of amendment, an amendment essential to the future safety of the republic, by the judgment of 25,000,000 men who have so solemnly declared by its ratification in 23 of the organized States of the Union.

This 14th article of amendment, as the Senate will recollect, was passed about the month of June, 1866, by the thirty-ninth Congress. After it had been passed, and ratified perhaps by some of the States, the President sent this telegram to Governor Parsons of Alabama, dated January 17, 1867:

What possible good can be obtained by reconsidering the constitutional amendment?

It had already been rejected by that legislature.

I know of none in the present posture of affairs; and I do not believe the people of the whole country will sustain any set of individuals in attempts to change the whole character of our government by enabling acts or otherwise.

"Any set of individuals;" not a congress, but a simple mob.

I believe, on the contrary, that they will eventually uphold all who have patriotism and courage to stand by the Constitution, and to place their confidence in the people. There should be no faltering on the part of those who are honest in their determination to sustain the several co-ordinate departments of the government in accordance with its original design.

Coupled with his messages to Congress, coupled with the utterances of his counsel from Tennessee, what is all this but an affirmation on the part of the President that the States lately in insurrection after all hold the power over the people of the organized States of this Union to the extent that they can neither legislate for the government of those disordered communities, nor amend their own constitution even for the government and protection of themselves? If it does not mean that, it means nothing. In the language of the learned counsel from New York, who appears as the able advocate of the President at this bar, it is an attempt on the part of the President to revive an expiring rebellion, "the lost cause." It is an utterance of his to the effect that unless the ten States lately in insurrection choose to assent, the people of the organized States shall not amend their constitution. The President calls on men to rally to his standard in support of the co-ordinate departments of the government against these encroachments of a "set of individuals" upon the rights of the people.

Senators, you remember well what the general provisions of the 14th article of the amendment were. I desire, however, to the right understanding of this question elsewhere as well as here, that this article of amendment shall go into the record of this case, thus assailed by the President in his conspiracy with those lately in rebellion, in his attempt to revive "the lost cause," in his attempt to impose a fetter upon the nation which at last will work its ruin and crown the

Digitized by Google

rebellion itself with success. The fourteenth article of amendment is in these words:

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

SEC. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SEC. 3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

SEC. 4. The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SEC. 5. That Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

That is the article which the people desire to adopt, and which the President by co-operation and combination with those lately in rebellion seeks to defeat. What right had he to meddle with it? The gentlemen undertook to draw a distinction between Andrew Johnson the citizen, and Andrew Johnson the President. I thought, Senators, at the time I could see some significance in it. It was a little hard for them to stand here and defend the right of the President under his sworn obligation to take care that the laws be faithfully executed, and to support the Constitution under the law and in accordance with the law and the limitations of the law, to excuse him as President for any of those utterances. It was a much more easy matter, if you will, to excuse him as private citizen Andrew Johnson for saying that the people were without a Congress, and that being without a Congress their legislation was void, and, of course, was not to be enforced except in so far as he saw fit to approve or to enforce it; that being without a Congress, they had no right to propose this article of amendment essential to the future life of the republic. What was this at last but saying that rebellion works no forfeiture? What was this at last but saying that by acts of secession and acts of rebellion in sufficient numbers among eleven States, or more than one-fourth of all the States of the Union, and a persistent refusal to elect members to Congress, they thereby deprive the people of legislative power, and by the same method deprive the people of the power to propose amendments to their own Constitution?

No more offensive words, Senators, ever were uttered by an executive officer in this country or any country; no utterances more offensive could by possibility be made by Andrew Johnson. They are understood by the common, plain people as the utterances of an expiring rebellion in the aid of the lost cause. Hostility to the amendment—why? Because, among other things, it forever makes slavery impossible in the land; because, among other things, it makes

Digitized by Google

the repudiation of the plighted faith of this nation, either to its living or to its dead defenders, forever impossible in the land; because, by its further provisions, it makes the assumption of any debt or liability contracted in aid of the rebellion, either by State or congressional legislation, forever impossible in the land; because, by its provisions, it makes compensation for slaves forever impossible in the land, either by congressional enactment or by State legislation. Is that the secret of this hostility? If not, then what is it? Simply that you have no Congress and no right to amend the Constitution; that your nationality is broken up and destroyed. And his own adviser and counsellor in this presence took the same ground, only he attempted to qualify it by saying that you might have the power of ordinary legislation, although you had no power of impeachment, and said that was the President's opinion; gave us notice in advance that that was the President's opinion. He will allow you to proceed with the mockery of the trial, giving you notice, however, that you have no right to pronounce judgment unless you pronounce judgment of acquittal!

As I said before, all the facts of this case support the averment of the eleventh article of impeachment. I do not propose to review them. I have referred already at sufficient length to the facts which do support it. I only ask senators to remember when they come to deliberate that there are several averments in the eleventh article of these attempts to violate the law which I have shown by your act of 1801 and the rule of common law are indictable in the District; that these were committed within the District; and that the averments are divisible. You might find him not guilty of one of the averments in the eleventh article and find him guilty of another. Surely you will find him guilty, and must find him guilty, upon your consciences, if you hold it to be a crime for the President purposely and deliberately to attempt to prevent the execution of a law of Congress, with or without force, with or without threat or intimidation. You must under the eleventh article find this man guilty of having entered into such combination and having contrived and devised to defeat and hinder and prevent, as averred in that article, the execution of the tenure-of-office act, especially, as therein averred, to prevent the Secretary of War from forthwith resuming the functions of his office in obedience to the requirements of the act. And it is no matter whether Secretary Stanton was within the act or without it, it was decided by the legislative department of the government, by the Senate of the United States under the Constitution, and its decision under the law should have controlled the President, as it certainly must control the Secretary.

The law was mandatory—it commanded the Secretary, upon the decision of the Senate and notice given to him, forthwith to resume the functions of that office, and for disobedience to its commands, after such judgment of the Senate and such notice, he himself should be impeached. Now, this fact being established and confessed, how is the Senate to get away from it when the President himself puts it in writing and confesses, on the 10th day of February, 1868, that as early as the 12th day of August, 1867, it was his purpose to prevent Edwin M. Stanton from resuming the functions of that office, and therefore it was his purpose, as alleged in the eleventh article, to prevent, if by possibility he could, the execution of the law? Senators, I can waste no further words upon the subject. It is useless for me to exhaust my strength by further argumentation.

I assume, senators, after all that I have said on this subject, that I have made it clear to the entire satisfaction of every senator that the substantive averments of the various articles preferred by the House of Representatives against the President are established by the proof and confessed substantially by his answer. I hold, senators, that these articles are substantially established upon the proofs in the case, upon the confessions of the President himself of record in his answer, in this, that the President did issue his order for the removal

of the Secretary of War during the session of the Senate of the United States in violation of the provisions of the act of March 2, 1867, regulating the tenure of certain civil offices, and with the intent to violate it, which intent the law implies, and which intent the President expressly confesses.

That his guilt is further established in this: that he did issue his letter of authority to Thomas in violation of that act, with the intent, as declared by himself, to prevent the Secretary of War from resuming the functions of the office after he himself had suspended him in pursuance of the provisions of the act, and submitted the same to the judgment of the Senate according to its requirements.

That he is guilty further in this: upon the proofs that he did unlawfully conspire with Lorenzo Thomas, as charged in the fourth, fifth, sixth, and seventh articles, with or without force, with or without intimidation, to prevent and hinder the Secretary of War from holding the office in direct violation of the terms of the tenure-of-office act.

That he is guilty further in this: that he did attempt to induce General Emory to violate the act making appropriations for the support of the army, the violation of which act is by its second section declared to be a high misdemeanor in office.

That he is guilty further in this: that by his intemperate and scandalous harangues he was guilty of a great public indecency and of the attempt to bring the Congress of the United States into contempt and to incite the people to sedition and anarchy.

That he is guilty in this: that by denying the constitutionality of the thirty-ninth Congress, and by his acts before referred to, he did assume to himself the prerogative of dispensing with the laws, of suspending their execution at pleasure, until such time as it might suit his own convenience to test the question of their validity or to ascertain the true construction of the Constitution in the courts of the United States.

And that by contriving with those lately in insurrection he did further attempt to prevent the ratification of the fourteenth article of amendment to the Constitution; and by all these several acts did attempt to prevent the execution of the tenure-of-office act, the execution of the army appropriation act, and the execution of the act for the more efficient government of the rebel States.

These facts being thus established will not only enforce conviction upon the Senate, in my judgment, but they will enforce conviction as well upon the minds of the great body of the people of this country.

Nothing remains, therefore, senators, for me further to consider in this discussion than the confession and attempted avoidance of the President as made in his answer. I have anticipated it in the body of my argument Senators have attended to what I have said. It is only needful for me to remind them that it is answered by the President that he claims the power indefinitely to suspend the heads of departments during the session of the Senate without their advice and consent, and to fill the vacancies thus made by appointments *ad interim;* that he claims the right to interpret the Constitution for himself, and, in the exercise of that right, to pronounce for himself upon the validity of every act of Congress which may be placed upon the statute book, and therefore, by virtue of his prerogative as the Executive of the United States, in defiance of your laws and in defiance of the transcendent power of impeachment, vested by the people in their House of Representatives, he may suspend the laws and dispense with their execution at his pleasure!

That is the position of the President. These are the offences with which he stands charged. They have acquired and taken something of technical form and shape in the articles; but the effect of the charges against the President is usurpation in office, suspending the people's laws, dispensing with the execu-

Digitized by Google

tion thereof purposely, with intent to violate them, and, in the language of the article, to hinder and to prevent their execution.

The attempted avoidance set up is an implied judicial power, as it was called by the learned counsel of the President, to determine for himself the true construction of the Constitution, and judicially to determine for himself the validity of all your laws. I have endeavored to show, senators, that this assumption of the President is incompatible with every provision of your Constitution; that it is at war with all the traditions of the republic; that it is in direct conflict with the contemporaneous and continued construction of the Constitution by the legislative, executive, and judicial departments. I have endeavored also to impress you, senators, with my own conviction that this assumption of the President to interpret the Constitution and the laws for himself, to suspend the execution of the laws at his pleasure, is an assumption of power simply to set aside the Constitution, to set aside the laws, and to annihilate the government of the people. This is the President's crime: that he has assumed this prerogative, dangerous to the people's liberties, violative alike of his oath, of the Constitution, and of the laws enacted under the Constitution. I have also endeavored to show to the Senate that these offences, as specified in the articles, are impeachable, and are declared by the laws of the land to be high crimes and misdemeanors, indictable and punishable as such.

And yet the President has the audacity in his answer—and I go not beyond it to convict him—to come before the Senate and declare in substance: "Admitting all that is charged against me to be true; admitting that I did suspend the execution of the laws; that I did enter into a conspiracy with intent to prevent the execution of the laws; that it was my purpose to prevent their execution; that I did issue a letter of authority in direct violation of the law; nevertheless, I say it was my right to do so, and it is not your right to hold me to answer, because by force of the Constitution I am entitled to interpret the Constitution for myself, and to decide upon the validity of a law, whether it conflicts with a power conferred upon me by the Constitution, and if it does, I must take the necessary steps to test its validity in the courts of justice." That is the President's answer as recorded here.

I have endeavored to show, further, that the civil tribunals of this country, under the Constitution, can by no possibility have any power to determine any such issue between the President and the people. I do not propose to repeat my argument, but I ask the Senate to consider, that if the courts shall be allowed to intervene, and in the first instance decide any question of this sort between the people and the accused President, it necessarily does result that the courts at last, acting upon the suggestions of the President, may decide every question of impeachment which can possibly arise by reason of the malfeasance and guilty acts of a President in office, and defy the power of the people to impeach him and try him in the Senate. What! the Supreme Court to decide a question of this sort for the Senate of the United States, when the Constitution declares that the Senate shall have the sole power to try all impeachments, which I said before necessarily includes the sole power to try every question of law and fact finally and forever between the President and the people!

That is my answer. That is the position we assume here on behalf of the people, before the Senate. If we are wrong; if, after all, you, Senators, can cast the burden which, in our judgment, the Constitution imposes upon you, and upon you alone, on the courts, thereby depriving the people of the power of removing an accused and guilty President, that is for you. We do not entertain for a moment the belief that the Senate will give any countenance to this position assumed by the President in his answer, and which at last constitutes his sole defence.

These acts charged, then, as I said, are acts of usurpation in office, criminal violations of the Constitution and laws of the land; and inasmuch as they are

Digitized by Google

committed by the Chief Magistrate of the nation, dangerous to the public liberties. The people, have declared in words too plain to be mistaken, and too strong to be evaded by the subtleties of a false logic, that the Constitution ordained by them, and the laws enacted by their representatives in Congress assembled, shall be obeyed, and shall be executed and enforced by their servant, the President of the United States, until the same shall be amended or repealed in the mode prescribed by themselves. They have written this decree of theirs all over this land in the tempest and fire of battle.

When twelve million people, standing within the limits of eleven States of this Union, entered into confederation and agreement against the supremacy of the Constitution and laws, and conspired to suspend their execution and to annul them within their respective territorial limits, from ocean to ocean, by a sublime uprising, the people stamped out in blood the atrocious assumption that millions of men were to be permitted, acting under State organizations, to suspend for a moment the supremacy of the Constitution or the execution of the people's laws. Is it to be supposed that this great and triumphant people, who but yesterday wrote this decree of theirs amid the flame of battle, are now at this day tamely to submit to the same assumption of power by a single man, and he their own sworn Executive? Let the people answer that question, as they assuredly will answer it, in the coming elections.

Is it not in vain, I ask you that the people have thus vindicated by battle the supremacy of their own Constitution and laws, if, after all, their President is permitted to suspend their laws and dispense with the execution thereof at pleasure, and defy the power of the people to bring him to trial and punishment before the only tribunal authorized by the Constitution to try him? That is the issue which is presented before the Senate for decision by these articles of impeachment. By such acts of usurpation on the part of the ruler of a people, I need not say to the Senate, the peace of nations is broken, as it is only by obedience to law that the peace of nations is maintained and their existence perpetuated. Law is the voice of God and the harmony of the world—

> It doth preserve the stars from wrong,
> Through it the eternal heavens are fresh and strong.

All history is but philosophy teaching by example. God is in history, and through it teaches to men and nations the profoundest lessons which they learn. It does not surprise me that the learned counsel for the accused asked the Senate, in the consideration of this question, to close that volume of instruction, not to look into the past, not to listen to its voices. Senators, from that day when the inscription was written upon the graves of the heroes of Thermopylæ, "Stranger, go tell the Lacedemonians that we lie here in obedience to their laws," to this hour no profounder lesson has come down to us than this: that through obedience to law comes the strength of nations and the safety of men.

No more fatal provision ever found its way into the constitutions of states than that contended for in this defence which recognizes the right of a single despot, or of the many, to discriminate in the administration of justice between the ruler and the citizen, between the strong and the weak. It was by this unjust discrimination that Aristides was banished because he was just. It was by this unjust discrimination that Socrates, the wonder of the Pagan world, was doomed to drink the hemlock because of his transcendent virtues. It was in honorable protest against this unjust discrimination that the great Roman senator, father of his country, declared that the force of law consists in its being made for the whole community.

Senators, it is the pride and boast of that great people from whom we are descended, as it is the pride and boast of every American, that the law is the supreme power of the state and is for the protection of each by the combined

Digitized by Google

power of all. By the constitution of England the hereditary monarch is no more above the law than the humblest subject; and by the Constitution of the United States the President is no more above the law than the poorest and most friendless beggar in your streets. The usurpations of Charles I inflicted untold injuries upon the people of England, and finally cost the usurper his life. The subsequent usurpations of James II—and I only refer to it because there is between his official conduct and that of this accused President the most remarkable parallel that I have ever read in history—filled the brain and heart of England with the conviction that new securities must be taken to restrain the prerogatives asserted by the Crown if they would maintain their ancient constitution and perpetuate their liberties. It is said by Hallam that the usurpations of James swept away the solemn ordinances of the legislature. Out of those usurpations came the great revolution of 1688, which resulted, as the Senate well know, in the dethronement and banishment of James, in the elevation of William and Mary, in the immortal Declaration of Rights, of which it is well said that it is—

> The germ of the law which gave religious freedom to the Dissenter; which secured the independence of the judges; which limited the duration of Parliaments; which placed the liberty of the press under the protection of juries; which prohibited the slave trade; which abolished the sacramental test; which relieved the Roman Catholics from civil disabilities; which reformed the representative system—of every good law which has been passed during a hundred and sixty years; of every good law which may hereafter in the course of ages be found necessary to promote the public weal and to satisfy the demands of public opinion.

That great Declaration of Rights contains in substance these words of accusation against this king of England:

> He has endeavored to subvert the liberties of the kingdom in this, that he has suspended and dispensed with the execution of the laws; in this, that he has issued commissions under the great seal contrary to law; in this, that he has levied money to the use of the Crown contrary to law; in this, that he has caused cases to be tried in the King's Bench which are cognizable only in the Parliament. (The Lords' Journal of Parliament, vol. 14, p. 125.)

I ask the Senate to notice that these charges against James are substantially the charges presented against this accused President and confessed here of record, that he has suspended the laws and dispensed with the execution of the laws, and in order to do this has usurped authority as the Executive of the nation, declaring himself entitled under the Constitution to suspend the laws and dispense with their execution. He has further, like James, issued a commission contrary to law. He has further, like James, attempted to control the appropriated money of the people contrary to law. And he has further, like James—although it is not alleged against him in the articles of impeachment, it is confessed in his answer—attempted to cause the question of his responsibility to the people to be tried, not in the King's Bench, but in the Supreme Court, when that question is alone cognizable in the Senate of the United States. Surely, if these usurpations, if these endeavors on the part of James thus to subvert the liberties of the people of England cost him his crown and kingdom, the like offences committed by Andrew Johnson ought to cost him his office and subject him to that perpetual disability pronounced by the people through the Constitution upon him for his high crimes and misdemeanors.

Senators, you will pardon me, but I will detain you but a few moments longer, for asking your attention to another view of this question between the people and the Executive. I use the words of England's brilliant historian when I say had not the legislative power of England triumphed over the usurpations of James, "with what a crash, felt and heard to the furthest ends of the world, would the whole vast fabric of society have fallen." May God forbid that the future historian shall record of this day's proceedings, that by reason of the failure of the legislative power of the people to triumph over the usurpations of an apostate President through the defection of the Senate of the United States, the just and great fabric of American empire fell and perished from the earth! The great revo-

Digitized by Google

lution of 1688 in England was a forerunner of your own Constitution. The Declaration of Rights to which I have referred but reasserted the ancient constitution of England, not found in any written instrument, but scattered through the statutes of four centuries.

The great principles thus reasserted by the Declaration of Rights in 1688 were, that no law should be passed without the consent of the representatives of the nation, no tax should be laid, no regular soldiery should be kept up, no citizen should be deprived for a single day of his liberty by the arbitrary will of the sovereign, no tool of power should plead the royal mandate in justification for the violation of any legal right of the humblest citizen, and forever swept away the assumption that the executive prerogative was above the fundamental law. These were the principles involved in that day in the controversy between the people and their recusant sovereign. They are precisely the principles this day involved in this controversy between the people and their recusant President. Without revolution, senators, like the great Parliament of 1688, you are asked to reassert the principles of the Constitution of your country, not to be searched for through the statutes of centuries, but to be found in that grand, sacred, written instrument given to us by the fathers of the republic. The Constitution of the United States, as I have said, embodies all that is valuable of England's Declaration of Rights, of England's constitution and laws. It was ordained by the people of the United States amid the convulsions and agonies of nations. By its express provisions all men within its jurisdiction are equal before the law, equally entitled to those rights of person which are as universal as the material structure of one man, and equally liable to answer to its tribunals of justice for every injury done either to the citizen or to the state.

It is this spirit of justice, of liberty, of equality, that makes your Constitution dear to freemen in this and in all lands, in that it secures to every man his rights, and to the people at large the inestimable right of self-government, the right which is this day challenged by this usurping President, for if he be a law to himself the people are no longer their own law-makers through their representatives in Congress assembled; the President thereby simply becomes their dictator. If the President becomes a dictator he will become so by the judgment of the Senate, not by the text of the Constitution, not by any interpretation heretofore put upon it by any act of the people, nor by any act of the people's representatives The representatives of the people have discharged their duty in his impeachment. They have presented him at the bar of the Senate for trial, in that he has usurped and attempted to combine in himself the legislative and judicial powers of this great people, thereby claiming for himself a power by which he may annihilate their government. We have seen that when the supremacy of their Constitution was challenged by battle, the people made such sacrifice to maintain it as has no parallel in history.

Can it be that after this triumph of law over anarchy, of right over wrong, of patriotism over treason, the Constitution and laws are again to be assailed in the capital of the nation in the person of the Chief Magistrate, and by the judgment of the Senate he is to be protected in that usurpation? The President by his answer and by the representations of his counsel asks you, deliberately asks you, by your judgment to set the accused above the Constitution which he has violated and above the people whom he has betrayed; and that, too, upon the pretext that the President has the right judicially to construe the Constitution for himself, and judicially to decide for himself the validity of your laws, and to plead in justification at your bar that his only purpose in thus violating the Constitution and the laws is to test their validity and ascertain the construction of the Constitution upon his own motion in the courts of justice, and thereby suspend your further proceeding.

I ask you, senators, how long men would deliberate upon the question whether a private citizen, arraigned at the bar of one of your tribunals of justice for a

criminal violation of the law, should be permitted to interpose a plea in justification of his criminal act that his only purpose was to interpret the Constitution and laws for himself, that he violated the law in the exercise of his prerogative to test its validity hereafter at such day as might suit his own convenience in the courts of justice. Surely, senators, it is as competent for the private citizen to interpose such justification in answer to crime in one of your tribunals of justice as it is for the President of the United States to interpose it, and for the simple reason that the Constitution is no respecter of persons and vests neither in the President nor in the private citizen judicial power.

Pardon me for saying it; I speak it in no offensive spirit; I speak it from a sense of duty; I utter but my own conviction, and desire to place it upon the record, that for the Senate to sustain any such plea, would, in my judgment, be a gross violation of the already violated Constitution and laws of a free people.

Can it be, senators, that by your decree you are at last to make this discrimination between the ruler of the people and the private citizen, and allow him to interpose his assumed right to interpret judicially your Constitution and laws? Are you really solemnly to proclaim by your decree:

> "Plate sin with gold,
> And the strong lance of justice hurtless breaks:
> Arm it in rags, a pigmy's straw doth pierce it?"

I put away the possibility that the Senate of the United States, equal in dignity to any tribunal in the world, is capable of recording any such decision even upon the petition and prayer of this accused and guilty President. Can it be that by reason of his great office the President is to be protected in his high crimes and misdemeanors, violative alike of his oath, of the Constitution, and of the express letter of your written law enacted by the legislative department of the government?

Senators, I have said perhaps more than I ought to have said. I have said perhaps more than there was occasion to say. I know that I stand in the presence of men illustrious in our country's history. I know that I stand in the presence of men who for long years have been in the nation's councils. I know that I stand in the presence of men who may, in some sense, be called to-day the living fathers of the republic. I ask you to consider that I speak before you this day in behalf of the violated law of a free people who commission me. I ask you to remember that I speak this day under the obligations of my oath. I ask you to consider that I am not insensible to the significance of the words of which mention was made by the learned counsel from New York: justice, duty, law, oath. I ask you to remember that the great principles of constitutional liberty for which I this day speak have been taught to men and nations by all the trials and triumphs, by all the agonies and martyrdoms of the past; that they are the wisdom of the centuries uttered by the elect of the human race who were made perfect through suffering.

I ask you to consider that we stand this day pleading for the violated majesty of the law, by the graves of a half million of martyred hero-patriots who made death beautiful by the sacrifice of themselves for their country, the Constitution, and the laws, and who, by their sublime example, have taught us that all must obey the law; that none are above the law; that no man lives for himself alone, but each for all; that some must die that the state may live; that the citizen is at best but for to-day, while the Commonwealth is for all time; and that position, however high, patronage, however powerful, cannot be permitted to shelter crime to the peril of the republic.

It only remains for me, senators, to thank you, as I do, for the honor you have done me by your kind attention, and to demand, in the name of the House of Representatives, and of the people of the United States, judgment against

Digitized by Google

the accused for the high crimes and misdemeanors in office whereof he stands impeached, and of which before God and man he is guilty.

As Mr. Manager Bingham concluded there were manifestations of applause in different portions of the galleries, with cheers.

The CHIEF JUSTICE. Order! Order! If this be repeated the Sergeant-at-arms will clear the galleries.

This announcement was received with laughter and hisses by some persons in the galleries, while others continued the cheering and clapping of hands.

Mr. GRIMES. Mr. Chief Justice, I move that the order of the court to clear the galleries be immediately enforced.

The motion was agreed to.

The CHIEF JUSTICE. The Sergeant-at-arms will clear the galleries. [Hisses and cheers and clapping of hands in parts of the galleries.] If the offence be repeated the Sergeant-at-arms will arrest the offenders.

Mr. TRUMBULL. I move that the Sergeant-at-arms be directed to arrest the persons making the disturbance, if he can find them, as well as to clear the galleries.

The CHIEF JUSTICE. The Chief Justice has already given directions to that effect.

[The Sergeant-at-arms, by his assistants, continued to execute the order by clearing the galleries.]

Mr. CAMERON. Mr. President, I hope the galleries will not be cleared. A large portion of the persons in the galleries had a very different feeling from that expressed by those who clapped and applauded. It was one of those extraordinary occasions which will happen sometimes——

Several SENATORS. Order.

Mr. FESSENDEN. I call the senator to order.

The CHIEF JUSTICE. Debate is not in order.

Mr. CAMERON. We all know that such outbursts will occasionally take place——

Mr. JOHNSON. I call the member to order.

The CHIEF JUSTICE. The senator from Pennsylvania is not in order. The galleries will be cleared.

Mr. CONNESS. Mr. President, I move that the court take a recess for fifteen minutes.

Several SENATORS. Not until the galleries are cleared.

The CHIEF JUSTICE. The question is on the motion of the senator from California, that the Senate, sitting as a court of impeachment, take a recess for fifteen minutes.

The motion was not agreed to.

Mr. DAVIS. I ask the presiding officer to have the order to clear the galleries enforced.

The CHIEF JUSTICE. The Sergeant at-arms states to the presiding officer that the order is being enforced as fast as practicable.

Mr. SHERMAN. Mr. President, is it in order to move that the Senate retire to its chamber for deliberation? I will make that motion, if it is in order.

Mr. TRUMBULL. I hope not.

The CHIEF JUSTICE. The Chief Justice thinks that until the order of the Senate is enforced it cannot properly take any other order or proceed with any other matter.

Mr. SHERMAN. Very well.

Mr. TRUMBULL. No order can be made until the galleries are cleared. That order is being executed.

Mr. SHERMAN. I think many persons in the galleries do not understand that they are ordered to leave the galleries. There is some misapprehension, I think.

The CHIEF JUSTICE. The persons in attendance in the galleries are informed

that the Senate has made an order that the galleries be cleared, and it is expected that those in the galleries will respect the order.

The galleries having been cleared, with the exception of the diplomatic gallery and the reporters' gallery,

Mr. ANTHONY. Mr. President, I move that the further execution of the order be dispensed with.

Mr. TRUMBULL. I insist that the order be executed.

Several SENATORS. So do I.

The CHIEF JUSTICE. Does the senator from Rhode Island withdraw his motion?

Mr. ANTHONY. No, sir; I make the motion.

The CHIEF JUSTICE. The senator from Rhode Island moves that the further execution of the order in regard to clearing the galleries be suspended.

Mr. CONKLING. I wish to ask a question of the Chair. I inquire whether the suspension of the order will open all the galleries for the return of those who have been turned out?

The CHIEF JUSTICE. The Chief Justice thinks it would have that effect.

Mr. TRUMBULL. I hope the order will not be suspended. Let it be executed.

The CHIEF JUSTICE. The question is on the motion to suspend the order clearing the galleries.

The motion was not agreed to.

The CHIEF JUSTICE. The galleries will be cleared.

The diplomatic gallery having been cleared,

Mr. MORRILL, of Maine. Mr. Chief Justice, I desire, if it is in order, to submit a motion. It is that when the Senate, sitting for the trial of the impeachment, adjourn to-day, it adjourn to Saturday next at 12 o'clock.

Mr. CAMERON. Before that——

The CHIEF JUSTICE. Debate is not in order.

Mr. CAMERON. I want to say that the motion was made against my judgment for clearing the galleries; but it was agreed to. I perceive that the galleries are not yet cleared; and until that order is carried out, I will not consent to any business.

The CHIEF JUSTICE. The Chief Justice sees nobody in the galleries.

Mr. CAMERON. The persons I refer to are behind the Chief Justice. (Referring to the reporters' gallery.)

The CHIEF JUSTICE. Does the senator from Pennsylvania object to——

Mr. CAMERON. No; but I desire that your order shall be carried out.

The CHIEF JUSTICE. The Chief Justice is informed that the reporters who occupy the reporters' gallery are still there. Is it the pleasure of the Senate that they shall remain?

Mr. CONNESS. I renew the motion for a recess.

The CHIEF JUSTICE. The Chief Justice desires to execute the will of the Senate precisely, and wishes to understand what it is. The senator from Pennsylvania has very properly called the attention of the Chief Justice to the fact that the reporters still remain in the galleries. Is it the pleasure of the Senate——

Several SENATORS. They are all out now. They are all gone.

The CHIEF JUSTICE. Then the order is completely executed. The Chair will now recognize the senator from California.

Mr. CONNESS. I move a recess.

Several SENATORS. Oh, no.

Mr. CONNESS. If it is manifestly not the judgment of the Senate, of course I do not want the question put.

The CHIEF JUSTICE. Does the senator withdraw his motion?

Mr. CONNESS. I withdraw it.

The CHIEF JUSTICE. The question is on the motion of the senator from

Digitized by Google

Maine, [Mr. Morrill,] that when the Senate, sitting as a court of impeachment, adjourn to-day, it adjourn to meet on Saturday next at 12 o'clock.

Mr. CONNESS. On that I call for the yeas and nays.

The yeas and nays were ordered; and being taken, resulted, yeas, 22; nays, 29; as follows:

YEAS—Messrs. Anthony, Cattell, Cragin, Dixon, Doolittle, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Howard, Johnson, Morrill of Maine, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ross, Saulsbury, Sprague, Trumbull, Van Winkle, and Willey—22.

NAYS—Messrs. Buckalew, Cameron, Chandler, Conkling Conness, Corbett, Davis, Drake, Edmunds, Ferry, Harlan, Hendricks, Howe, McCreery, Morgan, Morrill of Vermont, Morton, Nye, Pomeroy, Ramsey, Sherman, Stewart, Sumner, Thayer, Tipton, Vickers, Williams, Wilson, and Yates—29.

NOT VOTING—Messrs. Bayard, Cole, and Wade—3.

So the motion was not agreed to

Mr. EDMUNDS. I move that when the court adjourns, it adjourn to meet on Friday next, at 12 o'clock.

Mr. CONNESS. On that I call for the yeas and nays.

Mr. SHERMAN. I ask the senator from Vermont if he will not postpone his motion until we settle the question of the amount of debate to be allowed.

Mr. EDMUNDS. My motion is that when the court adjourns to-day it adjourn to the time named.

Mr. SHERMAN. I prefer to settle the other question. After that is settled I will vote to adjourn over.

Mr. EDMUNDS. For the time being, then, Mr. President, I withdraw the motion.

Mr. SHERMAN. There is a pending resolution, offered, I think, by the senator from Vermont himself, on that subject.

Mr. EDMUNDS. I have no objection to settling those questions first; indeed, I think it better that we should do so.

Mr. SUMNER. Mr. President, I would suggest that there were several orders that were expressly postponed to the close of the argument. They are, therefore, naturally at this moment in order.

Mr. CONKLING. I call for the regular order of business, Mr. President.

The CHIEF JUSTICE. The first order of business is the motion of the senator from Vermont, [Mr. Edmunds,] that the official reporters take report of the debates upon the final question, when the doors shall be closed for deliberation, to be printed in the proceedings. This refers to the closing of the doors for deliberation on the final question. The Secretary will read the order, and the amendments to it.

The CHIEF CLERK. The order submitted by the senator from Vermont, [Mr. Edmunds,] on the 24th of April, is as follows:

Ordered, That after the arguments shall be concluded, and when the doors shall be closed for deliberation upon the final question, the official reporters of the Senate shall take down the debates upon the final question, to be reported in the proceedings.

The senator from Oregon [Mr. Williams] moved to amend the proposed order by adding to it the words:

But no senator shall speak more than once, nor to exceed fifteen minutes, during such deliberation.

The CHIEF JUSTICE. The question is on the amendment.

Mr. ANTHONY. I move to amend the amendment by adding to it the words "except by leave of the Senate, to be had without debate, as provided in rule 23." The amendment as it stands seems to cut off the provision of rule 23. Perhaps the mover of the amendment will accept this modification, for I suppose it is not the intention to cut off that provision.

Mr. CONNESS. I rise for information. I rise to inquire of the Chair whether this is a consultation of the Senate that we are now proceeding with, and con-

sequently open to limited debate, or whether we are sitting as a court, debate not being in order?

The CHIEF JUSTICE. The Senate has made as yet no order for closing the doors for deliberation, nor has it made any order to retire for consultation. Consequently at present there can be no debate.

Mr. CONNESS. Upon the first order presented I ask for the yeas and nays.

The CHIEF JUSTICE. The question now is on the amendment of the senator from Rhode Island to the amendment of the senator from Oregon.

Mr. HOWARD. Mr. President, I ask for the reading of the 23d rule.

The CHIEF JUSTICE. The Secretary will read the 23d rule.

The rule was read, as follows:

XXIII. All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject to the operation of rule VII, except when the doors shall be closed for deliberation, and in that case no member shall speak more than once on one question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the members present.

Mr. DRAKE. Is the amendment offered by the senator from Rhode Island subject to amendment?

The CHIEF JUSTICE. It is not. It is an amendment to an amendment.

Mr. DRAKE. If it be adopted as an amendment can it be amended afterward?

Mr. ANTHONY. The senator can state what modification he desires.

Mr. DRAKE. I wish, before the word "leave," in the amendment proposed by the senator from Rhode Island, to insert the word "unanimous."

Mr. ANTHONY. I do not accept that proposition. My amendment merely conforms to the 23d rule.

Mr. WILLIAMS. I ask for information, if, under this proposed amendment of the senator from Rhode Island, the rule can be changed without one day's notice, or whether it can be changed at once upon the motion of any member?

Mr. THAYER. Mr. President, I desire to inquire if it is now in order to move that the doors of the galleries be opened.

The CHIEF JUSTICE. It is.

Mr. THAYER. Then I make that motion, and I ask for the reading of the 19th rule.

Mr. CONKLING. I hope the reporters' gallery at any rate will be opened, unless we mean to meet in secret conclave.

The CHIEF JUSTICE. The Secretary will read the 19th rule.

Rule 19 was read, as follows:

XIX. At all times while the Senate is sitting upon the trial of an impeachment, the doors of the Senate shall be kept open unless the Senate shall direct the doors to be closed while deliberating upon its decisions.

The CHIEF JUSTICE. That rule does not apply, as the Chief Justice understands, to the clearing of the galleries, but applies to the general closing of the doors for purposes of deliberation.

Mr. THAYER. I make the motion that the doors of the galleries be opened.

The CHIEF JUSTICE. That motion can be made at this time only by unanimous consent, there being another question pending. Is there any objection to the motion?

Mr. CONNESS. I object to it.

The CHIEF JUSTICE. The question is on the amendment of the senator from Rhode Island, [Mr. Anthony.]

Mr. CONKLING. I beg to make an inquiry of the Chair. I beg to inquire whether the order of the Chair included the place where the reporters sit, where no applause was made, and their absence from which leaves us entirely in secret session so far as public reports are concerned.

The CHIEF JUSTICE. The Chief Justice was under the impression that the

Digitized by Google

order of the Senate did not include the reporters' gallery, and put the question distinctly to the Senate whether it did or did not. While the question was being put the reporters left the gallery, and the point was not decided by the Senate.

Mr. CONKLING. Then I submit, as a question of order, that under the order the doors of the reporters' gallery should not have been closed, and are now open, in view of that order, to the reporters.

The CHIEF JUSTICE. If there be no objection——

Mr. CAMERON. It seems to me that while it may be very proper to admit reporters, it is equally proper to admit everybody——

The CHIEF JUSTICE. Debate is not in order.

Mr. CAMERON. I only desire to say a word. I think we ought to admit everybody——

Mr. CONKLING. The Chair did not direct the reporters' gallery to be cleared.

Mr. CAMERON. And the Chair certainly did not direct inoffensive people to be turned out.

Mr. SHERMAN. I move that the pending order be postponed with a view to submit a motion to open the galleries.

Mr. TRUMBULL. If the Senate will allow me, I desire to say that I think the demonstration in the galleries will not be repeated. I hope gentlemen will withdraw their objections and by unanimous consent let the galleries be opened.

Mr. SHERMAN. I think the object is accomplished.

Mr. TRUMBULL. I think we have accomplished all that is necessary. The order has been obeyed. If there is no objection, I hope the presiding officer will order the doors of the galleries to be opened.

The CHIEF JUSTICE. If there be no objection, the doors will be opened. The Chair hears no objection, and he directs the galleries to be opened.

Mr. WILSON. I move that the Senate take a recess for fifteen minutes.

The motion was agreed to; and at the expiration of the recess the Senate resumed its session.

The CHIEF JUSTICE. The Chief Justice understands that the argument on the part of the House of Representatives, and also on the part of the defendant, the President of the United States, is closed. If there is anything further to submit, the gentlemen on both sides will state it.

Mr. Manager BOUTWELL. Nothing further on the part of the managers.

Mr. EVARTS. Nothing on our part.

Mr. HENDRICKS. Mr. President, the questions that are now coming before the Senate ought to be discussed and debated. I move, therefore, that the Senate retire to consider of the different propositions that are before us, either to their room or in the Senate chamber; or if by unanimous consent the debate can be allowed to be extended to ten minutes, we remaining here, I do not want to disturb anybody, and I would rather go on and debate here as we are.

The CHIEF JUSTICE. The only motion in order is that the Senate retire for deliberation, or that the doors be closed for deliberation.

Mr. FESSENDEN. I suggest to the senator from Indiana to change his motion so that we may consult in this chamber and let the audience retire.

Mr. HENDRICKS. Mr. President——

The CHIEF JUSTICE. No debate is in order but by unanimous consent.

Mr. HENDRICKS. I was about to suggest that we proceed now as if we had retired, without disturbing anybody. I think we might so regard ourselves, and go on.

Mr. TRUMBULL. I suppose that can be done by unanimous consent.

The CHIEF JUSTICE. Certainly.

Mr. TRUMBULL. I hope it will be done.

Mr. HENDRICKS. By unanimous consent we may be allowed to proceed under the rules as if we had retired for deliberation.

Digitized by Google

The CHIEF JUSTICE. If there be no objection——

Mr. CONKLING. What is the precise proposition?

Mr. HENDRICKS. That we consider these questions in public as if we had retired, so that what is said in regard to these proposed rules shall be public.

Mr. CONNESS. That is to say, that debate shall be allowed.

Mr. HENDRICKS. To the extent of ten minutes, as limited by the rules.

The CHIEF JUSTICE. The Chief Justice thinks it proper to say to the Senate that this reverses its whole order of proceeding. It can be done, undoubtedly, by unanimous consent. If there be no objection——

Mr. EDMUNDS and Mr. WILLIAMS. I object.

The CHIEF JUSTICE. Objection is made. The senator from Indiana moves that the Senate retire for the purpose of considering the pending question.

Mr. EDMUNDS. I move to amend that motion so that it shall be an order, as the rules provide, that the doors shall be closed.

The CHIEF JUSTICE. That is the regular motion in order, that the doors be closed under the rules. The Senate has heretofore varied that proceeding by retiring for conference.

Mr. HENDRICKS. Senators will allow me to say that my only object in making this motion was to relieve ourselves in regard to the limitation of debate. I think there is no necessity for disturbing the audience, or disturbing the audience by going out.

The CHIEF JUSTICE. The Chief Justice must remind the Senator that debate is not in order. The question is on the motion to close the doors for deliberation.

The motion was agreed to.

The Senate chamber having been cleared and the doors closed,

The CHIEF JUSTICE stated the question to be on the order proposed by Mr. Edmunds, with the amendments thereto offered by Mr. Williams and Mr. Anthony.

After debate,

Mr. FRELINGHUYSEN moved to lay the proposed order on the table; which motion was agreed to—yeas, 28; nays, 20; as follows:

YEAS—Messrs. Cameron, Cattell, Chandler, Conkling, Conness, Corbett, Cragin, Drake, Ferry, Frelinghuysen, Harlan, Henderson, Howe, Morgan, Morrill of Maine, Morton, Norton, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Stewart, Sumner, Thayer, Tipton, Trumbull, Williams, and Yates—28.

NAYS—Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Doolittle, Edmunds, Fessenden, Fowler, Grimes, Hendricks, Johnson, McCreery, Morrill of Vermont, Patterson of Tennessee, Saulsbury, Sprague, Van Winkle, Vickers, and Willey—20.

NOT VOTING—Messrs. Cole, Howard, Nye, Sherman, Wade, and Wilson—6.

So the order was laid on the table.

The CHIEF JUSTICE laid before the Senate a letter from the Speaker of the House of Representatives, asking that the House might be notified when the doors of the Senate should be open.

On motion of Mr. EDMUNDS, it was

Ordered, That the Secretary inform the House of Representatives that the Senate, sitting for the trial of the President upon articles of impeachment, will notify the House when it is ready to receive them at the bar.

The CHIEF JUSTICE stated the next business in order to be the following order, submitted by Mr. Sumner on the 25th of April:

Ordered, That the Senate, sitting for the trial of Andrew Johnson, President of the United States, will proceed to vote on the several articles of impeachment at 12 o'clock on the day after the close of the arguments.

After debate,

Mr. DRAKE submitted the following amendment to Rule 23, to come in at the end of the rule:

The fifteen minutes herein allowed shall be for the whole deliberation on the final question, and not to the final question on each article of impeachment.

Digitized by Google

The proposed amendment was laid over for future consideration.

On motion of Mr. JOHNSON, the Senate, sitting for the trial of the impeachment, adjourned.

THURSDAY, *May* 7, 1868.

The Chief Justice of the United States took the chair.

The usual proclamation was made by the Sergeant-at-arms.

Mr. Nelson, of counsel for the respondent, appeared in his seat.

The journal of yesterday's proceedings of the Senate, sitting for the trial of the impeachment, was read.

The CHIEF JUSTICE. When the Senate was considering the order, which is now the unfinished business, it was sitting with closed doors, and the doors will now be closed for deliberation under the rules, unless there be some order to the contrary. [After a pause.] The doors will be closed for deliberation.

Mr. HOWE. Mr. President, I do not see any necessity for closing the doors. Unless senators do see a necessity for it I hope that order will not be executed.

The CHIEF JUSTICE. There can be no deliberation unless the doors are closed. There can be no debate under the rules unless the doors be closed.

Mr. SUMNER. Still, Mr. President, I would rise to a question of order. It is whether the Senate can proceed to deliberate now except by a vote. There must be another vote of the Senate in order to proceed to deliberate to-day, I take it. We adjourned last night, and we have now met in open session.

The CHIEF JUSTICE. There can be no debate on the question of order; but the Chief Justice will submit the question to the Senate. The senator from Massachusetts makes a question of order that before the Senate can proceed to deliberate there must be another formal vote of the Senate. The Chair will submit that question directly to the Senate.

Mr. SHERMAN. I should like to ask the senator from Massachusetts a question, whether he proposes to act on the pending resolution without debate?

Mr. SUMNER. I did not intend to interpose any opposition to anything. I only wished that whatever we did should be done according to the rules. We have now been sitting—this is merely an answer to the inquiry of the senator—in open session——

The CHIEF JUSTICE. Debate is out of order. It can go on by unanimous consent, not otherwise.

Mr. SUMNER. And how shall we get from open session into deliberation?

Mr. EDMUNDS. I object to debate.

The CHIEF JUSTICE. There can be no debate until the doors are closed.

Mr. CONKLING. I rise for information from the Chair. I wish to inquire whether, when the presiding officer announces that a certain thing will be done unless objection is made, that is not tantamount to a vote of the Senate, and does not cover, in substance, the point made by the senator from Massachusetts?

The CHIEF JUSTICE. The Chief Justice so regards it.

Mr. SUMNER. If that is understood——

Mr. EDMUNDS. I object to all debate.

Mr. TRUMBULL. Mr. President, I wish, before the doors are closed, to raise a question of order under the twenty-third rule, which reads as follows:

> All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record and without debate, except when the doors shall be closed for deliberation.

That means deliberation in reference to a matter, as I understand it, connected with the immediate trial. These are rules adopted for the general government

of the Senate in all cases of impeachment. I never understood, when I agreed to these rules, that they would be used as a restraint upon the Senate in reference to any question that might be raised here. Propositions are raised here having no particular bearing upon this trial as to the course of proceeding, and we ought to settle those, it seems to me——

Mr. EDMUNDS. I rise to a question of order. I object to debate until the order of the Chair is complied with.

The CHIEF JUSTICE. There can be no debate until the order of the Chair is executed.

Mr. TRUMBULL. What is the order?

The CHIEF JUSTICE. The Chair stated to the Senate that when deliberation was terminated by adjournment last evening they were sitting with closed doors, and unless some objection should be made he would direct the doors to be closed. He waited, and no objection was made, and he then directed the doors to be closed. Until that order is executed there can be no debate.

The chamber was thereupon cleared and the doors closed.

The CHIEF JUSTICE stated that the unfinished business before the Senate yesterday, at its adjournment, to wit, the motion submitted by Mr. Sumner on the 25th of April, that the Senate will proceed to vote on the several articles of impeachment at 12 o'clock m. on the day after the close of the arguments, was the business now before the Senate.

The Senate resumed the consideration of the resolution.

Mr. MORRILL, of Maine, moved to amend the motion of Mr. Sumner by striking out all after the word "that" in the first line, and inserting the following in lieu thereof:

When the Senate sitting to try impeachment adjourns to-day, it will be to Monday next at 12 o'clock m., when the Senate will proceed to take the yeas and nays on the articles of impeachment without debate; any senator desiring it to have permission to file a written opinion, to go upon the record of the proceedings.

Mr. DRAKE moved to amend the amendment by inserting after the word "permission" the words "at the time of giving his vote."

After debate,

Mr. CONKLING moved that the further consideration of the pending subject be postponed.

After further debate,

Mr. TRUMBULL moved that the pending subject lie on the table; which was agreed to.

Mr. MORRILL, of Vermont, submitted the following motion for consideration:

Ordered, That when the Senate adjourns to-day it adjourn to meet on Monday next, at 11 o'clock a. m., for the purpose of deliberation, under the rules of the Senate sitting on the trial of impeachment; and that on Tuesday, at 12 o'clock m., the Senate shall proceed to vote, without debate, on the several articles of impeachment, and each senator shall be permitted to file, within two days after the vote shall have been taken, his written opinion to go on the record.

Mr. ANTHONY moved to amend the motion of Mr. Morrill, of Vermont, by striking out the words "on Tuesday" and inserting the words "on or before Wednesday."

Mr. CONNESS called for the yeas and nays on the amendment, and they were ordered; and being taken, resulted—yeas, 13; nays, 37; as follows:

YEAS—Messrs. Anthony, Buckalew, Davis, Dixon, Doolittle, Fowler, Hendricks, McCreery, Patterson of Tennessee, Ross, Saulsbury, Sprague, and Vickers—13.

NAYS—Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Henderson, Howard, Howe, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Norton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Stewart, Sumner, Thayer, Tipton, Trumbull, Van Winkle, Willey, Williams, Wilson, and Yates—37.

NOT VOTING—Messrs. Bayard, Fessenden, Grimes, and Wade—4.

Digitized by Google

So the amendment was not agreed to.

Mr. SUMNER moved that the further consideration of the motion of Mr. Morrill, of Vermont, be postponed, and that the Senate proceed to consider the articles of impeachment.

After debate,

Mr. SUMNER called for the yeas and nays on his motion, and they were ordered; and being taken, resulted—yeas, 15; nays, 38; as follows:

YEAS—Messrs. Cameron, Conkling, Conness, Drake, Harlan, Morgan, Nye, Pomeroy, Stewart, Sumner, Thayer, Tipton, Williams, Wilson, and Yates—15.

NAYS—Messrs. Anthony, Bayard, Buckalew, Cattell, Chandler, Cole, Corbett, Cragin, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Howard, Howe, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ramsey, Ross, Saulsbury, Sherman, Sprague, Trumbull, Van Winkle, Vickers, and Willey—38.

NOT VOTING.—Mr. Wade—1.

So the amendment was not agreed to.

Mr. SUMNER moved to amend the motion of Mr. Morrill, of Vermont, by striking out the word "Monday," and inserting "Saturday."

Mr. SUMNER called for the yeas and nays, and they were ordered; and being taken, resulted—yeas, 16; nays, 36; as follows:

YEAS—Messrs. Cameron, Chandler, Cole, Conkling, Conness, Drake, Harlan, Howard, Morgan, Pomeroy, Stewart, Sumner, Thayer, Williams, Wilson, and Yates—16.

NAYS—Messrs. Anthony, Bayard, Buckalew, Cattell, Corbett, Cragin, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Howe, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ramsey, Ross, Saulsbury, Sherman, Sprague, Tipton, Trumbull, Van Winkle, Vickers, and Willey—36.

NOT VOTING—Messrs. Nye and Wade—2.

So the amendment was not agreed to.

Mr. SUMNER moved to amend the motion of Mr. Morrill, of Vermont, by striking out at the end thereof the following words:

And each senator shall be permitted to file within two days after the vote shall have been so taken his written opinion, to go on the record.

Mr. DRAKE moved to amend the portion proposed to be stricken out by striking out the words "within two days after the vote shall have been so taken," and inserting in lieu thereof the words "at the time of giving his vote."

Mr. DRAKE called for the yeas and nays on his amendment, and they were ordered; and being taken, resulted—yeas, 12; nays, 38; as follows:

YEAS—Messrs. Cameron, Chandler, Conkling, Conness, Drake, Harlan, Howard, Morgan, Ramsey, Stewart, Sumner, and Thayer—12.

NAYS—Messrs. Anthony, Bayard, Buckalew, Cattell, Cole, Corbett, Cragin, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Ross, Saulsbury, Sherman, Sprague, Tipton, Trumbull, Van Winkle, Vickers, Willey, Williams, Wilson, and Yates—38.

NOT VOTING—Messrs. Howe, Nye, Pomeroy, and Wade—4.

So the amendment was not agreed to.

The question recurring on the amendment proposed by Mr. Sumner to strike out the closing sentence of the motion of Mr. Morrill, of Vermont,

Mr. SUMNER called for the yeas and nays, and they were ordered; and being taken, resulted—yeas, 6; nays, 42; as follows:

YEAS—Messrs. Drake, Harlan, Ramsey, Stewart, Sumner, and Thayer—6.

NAYS—Messrs. Bayard, Buckalew, Cameron, Cattell, Chandler, Cole, Corbett, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Howard, Howe, Johnson, McCreery, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ross, Saulsbury, Sherman, Sprague, Tipton, Trumbull, Van Winkle, Vickers, Willey, Williams, Wilson, and Yates—42.

NOT VOTING—Messrs. Anthony, Conkling, Conness, Cragin, Nye, and Wade—6.

So the amendment was not agreed to.

Digitized by Google

Mr. MORRILL, of Vermont, having modified his motion, it was agreed to, as follows:

Ordered, That when the Senate adjourns to-day, it adjourn to meet on Monday next, at 11 o'clock a. m., for the purpose of deliberation, under the rules of the Senate, sitting on the trial of impeachments, and that on Tuesday next following, at 12 o'clock m., the Senate shall proceed to vote without debate on the several articles of impeachment; and each senator shall be permitted to file within two days after the vote shall have been so taken his written opinion, to be printed with the proceedings.

The Senate proceeded to consider the resolution submitted by Mr. DRAKE yesterday, to amend twenty-third rule by adding thereto the following:

The fifteen minutes herein allowed shall be for the whole deliberation on the final question, and not to the final question on each article of impeachment.

The resolution was adopted.

The Senate proceeded to consider the resolution submitted by Mr. Sumner on the 25th of April, to amend the rules by inserting the following additional rule:

RULE 23. In taking the votes of the Senate on the articles of impeachment, the presiding officer shall call each senator by his name, and upon each article propose the following question, in the manner following: "Mr. ———, how say you, is the respondent, ———, guilty or not guilty, as charged in the —— article of impeachment?" Whereupon each senator shall rise in his place and answer "guilty" or "not guilty."

Mr. CONKLING moved to amend the proposed rule by striking out the words "as charged in," and inserting the words "of high crime or misdemeanor (as the case may be) within."

After debate,

Mr. SUMNER modified his proposed rule by inserting after the words "not guilty" the words "of high crime or misdemeanor."

Mr. BUCKALEW moved to amend the proposed rule by striking out all after the word "following" where it last occurs, and inserting in lieu thereof:

Mr. ———, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high crime or misdemeanor (as the case may be) as charged in the article of impeachment?

Mr. SUMNER accepted the amendment of Mr. BUCKALEW.

Mr. CONNESS moved further to amend the proposed rule by striking out all after the word "upon" in the fourth line, and inserting in lieu thereof the following:

Each of the articles numbered one, two, three, four, five, seven, eight, nine, ten, and eleven proposes the following question in the manner following: Mr. Senator, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high crime or misdemeanor as charged in this article? And upon each of the articles numbered four and six he shall propose the following question: Mr. Senator, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high crime charged in this article? Whereupon each senator shall arise in his place and answer "guilty" or "not guilty."

After debate,

Mr. HENDRICKS moved to amend the amendment of Mr. CONNESS by inserting at the end thereof the following:

But in taking down the vote on the eleventh article the question shall be put as to each clause of said article charging a distinct offence.

After debate,

Mr. CONNESS called for the yeas and nays on the amendment to the amendment, and they were ordered; and being taken, resulted—yeas, 22; nays, 15; as follows:

YEAS—Messrs. Anthony, Davis, Doolittle, Drake, Edmunds, Ferry, Fowler, Frelinghuysen, Harlan, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Sprague, Tipton, Trumbull, Van Winkle, Vickers, and Willey—22.

NAYS—Messrs. Buckalew, Cole, Conness, Corbett Cragin, Morton, Patterson of New Hampshire, Pomeroy, Ramsey, Stewart, Sumner, Thayer, Williams, Wilson, and Yates—15.

Digitized by Google

NOT VOTING—Messrs. Bayard, Cameron, Cattell, Chandler, Conkling, Dixon, Fessenden, Grimes, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Nye, Saulsbury, Sherman, and Wade—17.

So the amendment was agreed to.

After debate,

The question recurring on the amendment proposed by Mr. Conness as amended,

Mr. JOHNSON moved that the whole subject lie upon the table.

Mr. SUMNER called for the yeas and nays on the motion, and they were ordered; and being taken, resulted—yeas, 24; nays, 11; as follows:

YEAS—Messrs. Bayard, Buckalew, Cameron, Cattell, Conness, Davis, Doolittle, Drake, Harlan, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Saulsbury, Sprague, Thayer, Tipton, Trumbull, Van Winkle, Vickers, Willey, and Yates—24.

NAYS—Messrs. Cole, Corbett, Cragin, Edmunds, Ferry, Pomeroy, Ramsey, Ross, Sumner, Williams, and Wilson—11.

NOT VOTING—Messrs. Anthony, Chandler, Conkling, Dixon, Fessenden, Fowler, Frelinghuysen, Grimes, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Sherman, Stewart, and Wade—19.

So the motion was agreed to.

On motion of Mr. Yates, it was

Ordered, That when the Senate adjourn, it be to Monday next at 10 o'clock a. m.

On motion of Mr. Cole, the Senate, sitting for the trial of the impeachment, adjourned.

MONDAY, *May* 11, 1868.

The Chief Justice of the United States took the chair.

The usual proclamation was made by the Sergeant-at-arms.

The journal of Thursday's proceedings of the Senate, sitting for the trial of the impeachment, was read.

The CHIEF JUSTICE. As the Senate meets this morning, under the order, for deliberation, the doors will be closed unless some senator desires to make a motion.

Mr. SHERMAN. Before the doors are closed I will submit a motion that I believe will receive the unanimous consent of the Senate. To-morrow will be a day on which there will be considerable excitement. I move, therefore, that the Sergeant-at-arms be directed to place his assistants through the gallery, and to arrest, without the order of the Senate, any person who violates the rules of order of the Senate. I do not know but that is the rule now; but it had better be announced publicly and openly so that everybody can understand that to-morrow there shall be no marks of approbation or disapprobation when the vote is cast.

Mr. EDMUNDS. Certainly, that is the standing order of the Senate now. I have no objection to the motion, however.

Mr. SHERMAN. I think this will give it more publicity.

Mr. SUMNER. I should say that an intimation made to the Sergeant-at-arms on that subject ought to be sufficient.

The CHIEF JUSTICE. The Chief Justice will state to the Senate that the Sergeant-at-arms has already taken the precaution suggested by the senator from Ohio.

Mr. SHERMAN. Then the Sergeant-at-arms ought to give notice in the morning papers.

Mr. WILLIAMS. I would suggest, too, that before the clerk proceeds to call the roll to-morrow morning, as there may be very many persons in the galleries who are strangers, the Chief Justice publicly admonish all persons in the galleries to observe order, and that no manifestations of applause or disapproba-

Digitized by Google

tion will be allowed in the Senate during the day; otherwise persons so violating the rule will be arrested.

The CHIEF JUSTICE. That will be done.

Mr. SHERMAN. I withdraw my motion.

The CHIEF JUSTICE. The Sergeant-at-arms will clear the galleries and close the doors.

The Senate chamber was thereupon cleared and the doors closed.

The CHIEF JUSTICE stated that, in compliance with the desire of the Senate, he had prepared the question to be addressed to Senators upon each article of impeachment, and that he had reduced his views thereon to writing; which he read.

Mr. BUCKALEW submitted the following motion; which was considered by unanimous consent, and agreed to:

Ordered, That the views of the Chief Justice be entered upon the journal of the proceedings of the Senate for the trial of impeachments.

The following are the views of the Chief Justice:

The CHIEF JUSTICE arose and addressed the Senate as follows:

SENATORS: In conformity with what seemed to be the general wish of the Senate when it adjourned last Thursday, the Chief Justice, in taking the vote on the articles of impeachment, will adopt the mode sanctioned by the practice in the cases of Chase, Peck, and Humphreys.

He will direct the Secretary to read the several articles successively, and after the reading of each article will put the question of guilty or not guilty to each senator, rising in his place, in the form used in the case of Judge Chase:

Mr. Senator ———, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor, as charged in this article?

In putting the question on articles 4 and 6, each of which charges a crime, the word "crime" will be substituted for the word "misdemeanor."

The Chief Justice has carefully considered the suggestion of the senator from Indiana, [Mr. Hendricks,] which appeared to meet the approval of the Senate, that in taking the vote on the 11th article, the question should be put on each clause, and has found himself unable to divide the article as suggested. The article charges several facts, but they are so connected that they make but one allegation, and they are charged as constituting one misdemeanor.

The first fact charged is, in substance, that the President publicly declared in August, 1866, that the 39th Congress was a Congress of only part of the States and not a constitutional Congress, intending thereby to deny its constitutional competency to enact laws or propose amendments of the Constitution; and this charge seems to have been made as introductory, and as qualifying that which follows, namely, that the President in pursuance of this declaration attempted to prevent the execution of the tenure-of-office act by contriving and attempting to contrive means to prevent Mr. Stanton from resuming the functions of Secretary of War after the refusal of the Senate to concur in his suspension, and also by contriving and attempting to contrive means to prevent the execution of the appropriation act of March 2, 1867, and also to prevent the execution of the rebel States governments act of the same date.

The gravamen of the article seems to be that the President attempted to defeat the execution of the tenure-of-office act, and that he did this in pursuance of a declaration which was intended to deny the constitutional competency of Congress to enact laws or propose constitutional amendments, and by contriving means to prevent Mr. Stanton from resuming his office of Secretary, and also to prevent the execution of the appropriation act and the rebel States governments act.

The single substantive matter charged is the attempt to prevent the execution of the tenure-of-office act; and the other facts are alleged either as intro-

Digitized by Google

ductory and exhibiting this general purpose, or as showing the means contrived in furtherance of that attempt.

This single matter, connected with the other matters previously and subsequently alleged, is charged as the high misdemeanor of which the President is alleged to have been guilty.

The general question, guilty or not guilty of a high misdemeanor as charged, seems fully to cover the whole charge, and will be put as to this article as well as to the others, unless the Senate direct some mode of division.

In the 10th article the division suggested by the senator from New York [Mr. Conkling] may be more easily made. It contains a general allegation to the effect that on the 18th of August, and on other days, the President with intent to set aside the rightful authority of Congress and bring it into contempt delivered certain scandalous harangues, and therein uttered loud threats and bitter menaces against Congress and the laws of the United States, enacted by Congress, thereby bringing the office of President into disgrace, to the great scandal of all good citizens, and sets forth in three distinct specifications the harangues, threats, and menaces complained of.

In respect to this article, if the Senate sees fit so to direct, the question of guilty or not guilty of the facts charged may be taken in respect to the several specifications, and then the question of guilty or not guilty of a high misdemeanor as chargedin the article can also be taken.

The Chief Justice, however, sees no objection to putting the general question on this article in the same manner as on the others, for, whether particular questions be put on the specifications or not, the answer to the final question must be determined by the judgment of the Senate, whether or not the facts alleged in the specifications have been sufficiently proved, and whether, if sufficiently proved, they amount to a high misdemeanor within the meaning of the Constitution.

On the whole, therefore, the Chief Justice thinks that the better practice will be to put the general question on each article without attempting to make any sub-division, and will pursue this course if no objection is made. He will, however, be pleased to conform to such directions as the Senate may see fit to give in this respect.

Whereupon—

Mr. SUMNER submitted the following order, which was considered by unanimous consent and agreed to.

Ordered, That the questions be put as proposed by the presiding officer of the Senate, and each senator shall rise in his place and answer "Guilty," or "Not guilty," only.

On motion by Mr. SUMNER, the Senate proceeded to consider the following resolution, submitted on the 25th of April last:

Resolved, That the following be added to the rules of procedure and practice in the Senate when sitting on the trial of impeachments:

On a conviction by the Senate, it shall be the duty of the presiding officer forthwith to pronounce the removal from office of the convicted person, according to the requirement of the Constitution. Any further judgment shall be on the order of the Senate.

After debate,

The CHIEF JUSTICE announced that the hour of 11 o'clock a. m., fixed by order of the Senate for deliberation and debate, had arrived, and that Senators could now submit their views on the several articles of impeachment, subject to the limits to debate fixed by the twenty-third rule.

After deliberation,

On motion of Mr. CAMERON, at 10 minutes before 2 o'clock p. m., the Senate took a recess for 20 minutes; at the expiration of which,

After further deliberation and debate,

On motion by Mr. CONNESS, at 5 o'clock and 30 minutes p. m., the Senate took a recess until 7½ o'clock p. m.

Digitized by Google

The Senate reassembled at 7 o'clock and 30 minutes p. m. and resumed deliberation.

Mr. EDMUNDS submitted the following motion; which was considered by unanimous consent and agreed to:

Ordered, That the Secretary be directed to inform the House of Representatives that the Senate, sitting for the trial of the President of the United States, will be ready to receive the House of Representatives in the Senate chamber on Tuesday, the 12th of May, at 12 o'clock m.

After further deliberation,

Mr. EDMUNDS submitted the following motion for consideration:

Ordered, That the standing order of the Senate, that it will proceed at 12 o'clock noon to-morrow to vote on the articles of impeachment, be rescinded.

After further deliberation,

On motion of Mr. EDMUNDS, it was

Ordered, That when the Senate, sitting for the trial of the President on articles of impeachment, adjourn it be to meet to-morrow at 11½ o'clock a. m.

On motion of Mr. CAMERON, the Senate, sitting for the trial of the impeachment, adjourned.

TUESDAY, *May* 12, 1868

The Chief Justice of the United States took the chair.

The usual proclamation was made by the Sergeant-at-arms.

Messrs. Managers Bingham, Boutwell, Logan, and Stevens appeared at the managers' table.

Messrs. Stanbery, Evarts, and Groesbeck, of counsel for the respondent, appeared in their seats.

The Secretary proceeded to read the journal of yesterday's proceedings of the Senate sitting for the trial of the impeachment.

Mr. EDMUNDS. As time is rapidly flying, I move that the further reading of the journal be dispensed with.

The CHIEF JUSTICE. It will be so ordered if there be no objection.

Mr. DAVIS. I object. I want the journal read.

The Secretary resumed and concluded the reading of the journal.

Mr. EDMUNDS. I move to take up the order that I offered yesterday.

The CHIEF JUSTICE. The order offered by the senator from Vermont is the first business for consideration The Secretary will read the order.

The order was read, as follows:

Ordered, That the standing order of the Senate that it will proceed at 12 o'clock noon to-morrow to vote on the articles of impeachment be rescinded.

Mr. CHANDLER. Mr. President——

The CHIEF JUSTICE. The senator from Michigan. No debate is in order.

Mr. CHANDLER. I desire to make a statement, with the unanimous consent of the Senate, in regard to my colleague. He is very sick——

The CHIEF JUSTICE. The senator from Michigan can make his statement by unanimous consent. The Chair hears no objection.

Mr. CHANDLER. My colleague [Mr. Howard] was taken suddenly ill, and was delirious yesterday all day, and is very sick, indeed, this morning. He desires to be here. He told me that he would be here, even if it imperilled his life; but both his physicians protested against his coming, and said it would imperil his life. With that statement I desire to move that the Senate, sitting as a court, adjourn until Saturday at 12 o'clock.

Mr. EDMUNDS. Let my order be passed first.

Mr. CHANDLER. Let the order of the senator from Vermont be acted upon, and after it is agreed to, I desire to make the motion I have indicated.

Law Eagle

The CHIEF JUSTICE. The question is on the order offered by the senator from Vermont.

The order was agreed to.

Mr. CHANDLER. I now make the motion that the Senate, sitting as a court, adjourn until Saturday at 12 o'clock.

Mr. HENDRICKS. I move to amend by saying "to-morrow at 12 o'clock."

Mr. CHANDLER. There is no probability, his physicians inform me, that my colleague will be able to be out to-morrow. He had a very high fever and was delirious all day yesterday and last night. I think Saturday the earliest time possible, although he says he will be here to-day if the Senate insist on taking the vote; but it certainly will be at the peril of his life.

Mr. FESSENDEN. I wish to inquire whether rescinding the order as to taking the vote and the postponement until Saturday will leave the order with reference to filing opinions to go over, and whether the time there fixed will apply to the final vote or whether it will apply from to-day?

Mr. JOHNSON and Mr. DRAKE. The final vote.

The CHIEF JUSTICE. The Chief Justice understands that that order applies to the final vote.

Mr. CONNESS. And two days thereafter.

Mr. HENDRICKS. Mr. President——

The CHIEF JUSTICE. Does the senator from Indiana move his amendment?

Mr. HENDRICKS. Yes, sir. I change my motion to say "on Thursday, at 12 o'clock." To postpone it until Saturday is a matter of great personal inconvenience to me and possibly other senators. If we can possibly get a vote as early as Thursday it will be a great convenience. If the senator from Michigan is not well enough to be here on Thursday, of course there will be no objection to a further postponement.

Mr. CHANDLER. Mr. President——

The CHIEF JUSTICE. No debate is in order.

Mr. CHANDLER. Would Friday suit?

Several SENATORS. No, no.

The CHIEF JUSTICE. The senator from Indiana moves to substitute Thursday for Saturday.

The amendment was rejected.

Mr. TIPTON. I move now to amend by saying Friday.

The CHIEF JUSTICE. The senator from Nebraska moves to amend by substituting Friday for Saturday.

The amendment was rejected.

The CHIEF JUSTICE. The question recurs on the motion of the senator from Michigan to adjourn until Saturday, at 12 o'clock.

Mr. BUCKALEW. I suggest that we make some order informing the House of Representatives.

Mr. CONNESS and others. That can be done afterward.

Mr. BUCKALEW. Then the question ought to be put in this form, that when we adjourn to-day we adjourn to meet at that time instead of being an absolute adjournment.

The CHIEF JUSTICE. Does the senator from Michigan accept that modification, that when the Senate, sitting as a court, adjourns to-day it adjourn to meet on Saturday at 12 o'clock?

Mr. CHANDLER. Certainly.

The CHIEF JUSTICE. Then the question is on that motion.

The motion was agreed to.

Mr. EDMUNDS. I move that the Secretary be directed to inform the House of Representatives that the Senate will proceed further upon this trial on Saturday at 12 o'clock. [After a pause.] On reflection and consultation with the Chief Justice, I think it better to withdraw the motion I made, inasmuch as the illness

of Mr. Howard is so uncertain; we can notify the House at that time if it shall be necessary that they attend.

Mr. DRAKE. Mr. President, I move that the Senate, sitting upon the trial of the impeachment, do now adjourn.

The motion was agreed to.

The CHIEF JUSTICE. The Senate, sitting as a court of impeachment, stands adjourned until Saturday at 12 o'clock.

SATURDAY, *May* 16, 1868.

The Chief Justice of the United States took the chair at 12 o'clock m.

The usual proclamation was made by the Sergeant-at-arms.

Messrs. Managers BINGHAM, BOUTWELL, WILSON, BUTLER, LOGAN, WILLIAMS, and STEVENS appeared at the manager's table.

Messrs. Stanbery, Nelson, Evarts, and Groesbeck, of counsel for the respondent, appeared in their seats.

The Secretary read the journal of last Tuesday's proceedings of the Senate, sitting for the trial of the impeachment.

Mr. EDMUNDS. Mr. President, I offer the following resolution to notify the House of Representatives.

The CHIEF JUSTICE. The order will be read.

The chief clerk read as follows:

Ordered, That the Secretary be directed to inform the House of Representatives that the Senate, sitting for the trial of the President upon articles of impeachment, is now ready to receive them in the Senate chamber.

The order was agreed to.

The CHIEF JUSTICE. The Secretary will notify the House of Representatives.

Mr. WILLIAMS. Mr. President, I move that the Senate proceed to the consideration of the order that I submitted the other day as to reading the articles.

The CHIEF JUSTICE. The Secretary will read the order which the senator from Oregon proposes to take up.

The executive clerk read as follows:

Ordered, That the Chief Justice, in directing the Secretary to read the several articles of impeachment, shall direct him to read the eleventh article first, and the question shall then be taken on that article, and thereafter the other ten successively as they stand.

Mr. JOHNSON. That is not debatable, I suppose.

The CHIEF JUSTICE. It is not debatable.

Mr. JOHNSON. But I rise to inquire the reason for changing the order of the articles?

Mr. CONNESS. I object to debate.

The CHIEF JUSTICE. Debate is not in order.

Mr. EDMUNDS. Sickness is the reason.

Mr. HENDRICKS and Mr. JOHNSON called for the yeas and nays, and they were ordered.

The CHIEF JUSTICE. The Secretary will read the order again.

The chief clerk read the proposed order.

The CHIEF JUSTICE. The question is on taking up the order for consideration, upon which the yeas and nays have been ordered.

The question, being taken by yeas and nays, resulted—yeas, 34; nays, 19; as follows:

YEAS—Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Williams, Wilson, and Yates—34.

NAYS—Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, Vickers, and Willey—19.

NOT VOTING—Mr. Grimes—1.

Digitized by Google

So the order was taken up for consideration.

The CHIEF JUSTICE. The question now is on the adoption of the order proposed by the senator from Oregon.

Mr. FESSENDEN. I ask for the yeas and nays on the adoption of that order.

The yeas and nays were ordered.

The Sergeant-at-arms announced the presence of the House of Representatives at the bar, and the members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

Mr. MORTON. I desire to have the question stated.

The CHIEF JUSTICE. The Secretary will read the order.

The chief clerk read the order submitted by Mr. Williams.

The question being taken by yeas and nays, resulted—yeas, 34; nays, 19; as follows:

YEAS—Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbin, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Williams, Wilson, and Yates—34.

NAYS—Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, Vickers, and Willey—19.

NOT VOTING—Mr. Grimes—1.

So the order was agreed to.

Mr. HOWARD. Mr. President, if it be in order, I desire to place on the files of the Senate my opinion.

The CHIEF JUSTICE. It is in order.

Mr. HOWARD. I will, then, send it to the Secretary to be filed. I have not had an opportunity to do so until this time, in consequence of my ill health.

Mr. EDMUNDS. Mr. President, I move that the Senate now proceed to vote upon the articles according to the order of the Senate just adopted.

Mr. FESSENDEN. Before that motion is made, I wish to make a motion that the voting be postponed for half an hour, and I will state the reason why I make it, as the senator from Michigan [Mr. CHANLER] stated the other day. I saw Mr. GRIMES last evening, and he told me that he should certainly be here this morning. It was his intention——

Mr. JOHNSON. Will the honorable member permit me to interrupt him for a moment? He is here.

Mr. FESSENDEN. I thought he was not.

Mr. JOHNSON. I have sent for him. He is down stairs. He will be in the chamber in a moment. Here he is.

Mr. GRIMES entered the Senate chamber.

Mr. FESSENDEN. I withdraw the motion.

The CHIEF JUSTICE. The question is on the motion submitted by the senator from Vermont.

Mr. DAVIS. We do not know what the motion is.

The CHIEF JUSTICE. The senator from Vermont will please to put his motion in writing.

Mr. DAVIS, (after a pause.) Mr. Chief Justice, we understand the motion made by the senator from Vermont, and there is no necessity for having it reduced to writing.

Mr. EDMUNDS. I have reduced it to writing and send it to the Chair.

The CHIEF JUSTICE. The motion will be read.

The chief clerk read as follows:

Ordered, That the Senate now proceed to vote upon the articles, according to the rules of the Senate.

Digitized by Google

The order was agreed to.

The CHIEF JUSTICE. By direction of the Senate the Chief Justice admonishes the citizens and strangers in the galleries that absolute silence and perfect order are required. It will be matter of unfeigned regret if any violation of the order of the Senate should necessitate the execution of its further order, that the persons guilty of disturbance be immediately arrested.

Senators, in conformity with the order of the Senate, the Chair will now proceed to take the vote on the 11th article, as directed by the rule. The Secretary will read the 11th article.

The chief clerk read as follows:

ARTICLE XI.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office, and of his oath of office, and in disregard of the Constitution and laws of the United States, did heretofore, to wit, on the 18th day of August, A. D. 1866, at the city of Washington and the District of Columbia, by public speech, declare and affirm, in substance, that the 39th Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same, but, on the contrary, was a Congress of only a part of the States, thereby denying, and intending to deny, that the legislation of said Congress was valid or obligatory upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and also thereby denying, and intending to deny, the power of the said 39th Congress to propose amendments to the Constitution of the United States; and, in pursuance of said declaration, the said Andrew Johnson, President of the United States, afterwards, to wit, on the 21st day of February, A. D. 1868, at the city of Washington, in the District of Columbia, did, unlawfully, and in disregard of the requirements of the Constitution that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, by unlawfully devising and contriving, and attempting to devise and contrive, means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension theretofore made by said Andrew Johnson of said Edwin M. Stanton from said office of Secretary for the Department of War; and also by further unlawfully devising and contriving, and attempting to devise and contrive, means, then and there to prevent the execution of an act entitled "An act making appropriations for the support of the army for the fiscal year ending June 30, 1868, and for other purposes," approved March 2, 1867; and also to prevent the execution of an act entitled "An act to provide for the more efficient government of the rebel States," passed March 2, 1867, whereby the said Andrew Johnson, President of the United States, did then, to wit, on the 21st day of February, A. D. 1868, at the city of Washington, commit and was guilty of a high crime and misdemeanor in office.

The CHIEF JUSTICE. Call the roll.

The chief clerk called the name of Mr. Anthony.

Mr. Anthony rose in his place.

The CHIEF JUSTICE. Mr. Senator Anthony, how say you? Is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor, as charged in this article?

Mr. ANTHONY. Guilty.

[This form was continued in regard to each senator as the roll was called alphabetically, each rising in his place as his name was called and answering "Guilty" or "Not guilty." When the name of Mr. Grimes was called, he being very feeble, the Chief Justice said he might remain seated; he, however, with the assistance of friends, rose and answered. The Chief Justice also suggested to Mr. Howard that he might answer in his seat, but he preferred to rise.]

The call of the roll was completed with the following result:

The senators who voted "Guilty" are Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Willey, Williams, Wilson, and Yates—35.

The senators who voted "Not guilty" are Messrs. Bayard, Buckalew, Davis,

Digitized by Google

Dixon, Doolittle, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, and Vickers—19.

The CHIEF JUSTICE. The Secretary will now read the first article.

Mr. WILLIAMS. Mr. Chief Justice, I move that the Senate take a recess for fifteen minutes.

The motion was not agreed to.

The CHIEF JUSTICE, (to the chief clerk.) Read the first article.

Mr. WILLIAMS. Mr. President, I move that the Senate, sitting as a court of impeachment, adjourn until the 26th day of this month, at 12 o'clock.

The CHIEF JUSTICE. The senator from Oregon moves that the Senate sitting as a court of impeachment adjourn—until what day?

Mr. WILLIAMS. Tuesday, the 26th instant, at 12 o'clock.

Mr. JOHNSON. Mr. Chief Justice——

The CHIEF JUSTICE. No debate is in order.

Mr. JOHNSON. I only ask if it is in order to adjourn the Senate when it is pronouncing judgment? It has already decided upon one of the articles.

The CHIEF JUSTICE. The precedents seem to be, except in one case, and that is the case of Humphreys, that the announcement be not made by the presiding officer until after the vote had been taken on all the articles. The Chair will, however, take the direction of the Senate. If they desire the announcement of the vote which has been taken to be now made, he will make it.

Mr. SHERMAN. That announcement had better be made. The yeas and nays should be read over first, however.

Mr. JOHNSON. There may be some mistake in the count.

The CHIEF JUSTICE. The Secretary will read the list, if there be no objection.

Mr. DRAKE. I rise to a question of order, that a motion to adjourn is pending, and that that motion takes precedence of all other things.

Mr. HENDRICKS. I suggest, sir, as a modification well known of that rule, that a motion to adjourn cannot be made pending the taking of a vote. The vote is not completed until it is announced. It is not in order pending the call of the roll, and that is not completed until the result is announced.

The CHIEF JUSTICE. The Chair stated that if such was the desire of the Senate the vote would be announced, and no objection was heard to that course.

Mr. DOOLITTLE. On the question of order, I submit that a motion to adjourn to some other day is not a privileged motion.

Mr. JOHNSON. I move, Mr. Chief Justice, that the vote be announced. That is in order certainly.

The CHIEF JUSTICE. If there be no objection, the vote on the eleventh article will be announced.

The chief clerk read the list of those voting "Guilty" and "Not guilty," respectively, as follows:

GUILTY—Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill or Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Willey, Williams, Wilson, and Yates—35.

NOT GUILTY—Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, and Vickers—19.

The CHIEF JUSTICE. Upon this article 35 senators vote "Guilty," and 19 senators vote "Not guilty." Two-thirds not having pronounced guilty, the President is, therefore, acquitted upon this article.

Mr. CAMERON. Now, Mr. President, I renew the motion that the Senate adjourn until Tuesday, the 26th instant.

The CHIEF JUSTICE. That is the pending motion.

Mr. HENDRICKS. I ask what is the motion?

Digitized by Google

The CHIEF JUSTICE. The motion is that the Senate, sitting as a court of impeachment, adjourn to meet at twelve o'clock on Tuesday, the 26th instant.

Mr. HENDRICKS. Then, Mr. President, I submit, as a question of order, that the Senate is now executing an order already made, which is in the nature and has the effect of the previous question, and therefore a motion to adjourn otherwise than simply to adjourn at once is not in order.

The CHIEF JUSTICE. A motion that when the Senate adjourns it adjourn to meet at a certain day could not now be entertained, because the Senate is in process of executing an order. A motion to adjourn to a certain day seems to the Chair to come under the same rule. He will, therefore, decide the motion not to be in order.

Mr. CONNESS. Mr. President, from that decision of the Chair I appeal.

The CHIEF JUSTICE. The Chief Justice decides that a motion to adjourn to a day certain is within the principle of a motion that when the Senate adjourns it adjourn to meet upon a certain day, and that this motion is not in order pending the execution of the order already made by the Senate. That the Senate may understand the ground of the decision he will direct the Clerk to read the order under which the Senate is now acting.

The chief clerk read as follows:

Ordered, That the Senate now proceed to vote upon the articles, according to the rules of the Senate.

Mr. CONKLING. I rise for information from the Chair. Is the order just read by the Secretary the order adopted this morning on the motion of the senator from Vermont, [Mr. Edmunds?]

The CHIEF JUSTICE. It is. From the ruling of the Chief Justice an appeal is taken to the Senate. Senators, you who agree to sustain the ruling of the Chair will say ay; those of the contrary opinion will say no.

Mr. CONNESS. Upon that question I call for the yeas and nays

The yeas and nays were ordered; and being taken, resulted—yeas, 24; nays, 30; as follows:

YEAS—Messrs. Anthony, Bayard, Buckalew, Conkling, Davis, Dixon, Doolittle, Ferry, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morgan, Norton, Patterson of Tennessee, Saulsbury, Sherman, Trumbull, Van Winkle, Vickers, and Willey—24.

NAYS—Messrs. Cameron, Cattell, Chandler, Cole, Conness, Corbett, Cragin, Drake, Edmunds, Frelinghuysen, Harlan, Howard, Howe, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Williams, Wilson, and Yates—30.

The CHIEF JUSTICE. The decision of the Chair is not sustained, and the motion of the senator from Oregon is in order.

Mr. HENDERSON. The motion, I believe, is to adjourn the court until the 26th instant. I move to strike out the date and insert "Wednesday, the 1st day of July next."

The CHIEF JUSTICE. The question is on the amendment of the senator from Missouri.

Mr. TRUMBULL called for the yeas and nays, and they were ordered.

The CHIEF JUSTICE. Senators, you who agree that "Tuesday, the 26th instant," shall be stricken out, and the words "Wednesday, the 1st of July," be inserted, will, as your names are called, answer yea; those of the contrary opinion nay.

The yeas and nays being taken, resulted—yeas, 20; nays, 34; as follows:

YEAS—Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, Vickers, and Willey—20.

NAYS—Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Williams, Wilson, and Yates—34.

So the amendment was rejected.

The CHIEF JUSTICE. The question recurs on the motion submitted by the senator from Oregon, that the Senate sitting as a court of impeachment adjourn until Tuesday, the 26th instant.

Mr. MCCREERY. Is an amendment in order?

The CHIEF JUSTICE. It is.

Mr. MCCREERY. I move to amend by providing that when the Senate sitting as a court of impeachment adjourns to-day, it adjourn without day.

The senator from Kentucky moves to strike out the words, "Tuesday, the 26th instant," and insert "without day."

Mr. MCCREERY. I call for the yeas and nays on that amendment.

The yeas and nays were ordered; and being taken, resulted—yeas, 6; nays, 47; as follows:

YEAS—Messrs. Bayard, Davis, Dixon, Doolittle, McCreery, and Vickers—6.

NAYS—Messrs. Anthony, Buckalew, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Harlan, Henderson, Hendricks, Howard, Howe, Johnson, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Norton, Nye, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ramsey, Ross, Saulsbury, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Trumbull, Van Winkle, Wade, Willey, Williams, Wilson, and Yates—47.

NOT VOTING—Mr. Grimes—1.

So the amendment was rejected.

Mr. BUCKALEW. Mr. President, I move to strike out the date named and insert "Monday next."

The CHIEF JUSTICE. The question is on the amendment of the senator from Pennsylvania.

The amendment was rejected.

The CHIEF JUSTICE. The question recurs on the motion of the senator from Oregon.

Mr. HENDRICKS. On that I ask for the yeas and nays.

The yeas and nays were ordered.

The CHIEF JUSTICE. The question is on the motion of the senator from Oregon for an adjournment of the Senate sitting as a court of impeachment until Tuesday, the 26th instant.

Mr. CONKLING. What is the motion—that when the Senate adjourns to-day it adjourn to that time, or that it now adjourn until that time?

The CHIEF JUSTICE. That the Senate sitting as a court of impeachment do now adjourn until Tuesday, the 26th instant.

The question being taken by yeas and nays, resulted—yeas, 32; nays, 21; as follows:

YEAS—Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conness, Corbett, Cragin, Drake, Edmunds, Frelinghuysen, Harlan, Howard, Howe, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sprague, Stewart, Sumner, Thayer, Tipton, Van Winkle, Wade, Williams, Wilson, and Yates—32.

NAYS—Messrs. Bayard, Buckalew, Conkling, Davis, Dixon, Doolittle, Ferry, Fessenden, Fowler, Henderson, Hendricks, Johnson, McCreery, Morgan, Norton, Patterson of Tennessee, Saulsbury, Sherman, Trumbull, Vickers, and Willey—21.

NOT VOTING—Mr. Grimes—1.

The CHIEF JUSTICE. On this question the yeas are 32, and the nays are 21. So the Senate siting as a court of impeachment stands adjourned until Tuesday, the 26th instant, at 12 o'clock.

TUESDAY, *May* 26, 1868.

The Chief Justice of the United States took the chair at 12 o'clock m.

The usual proclamation was made by the Sergeant-at arms.

Messrs. Stanbery, Evarts, and Nelson, of counsel for the respondent, appeared in their seats.

Digitized by Google

Mr. WILLIAMS. I offer the following order.

The CHIEF JUSTICE. The Secretary will read the order.

The chief clerk read as follows:

Resolved, That the resolution heretofore adopted as to the order of reading and voting upon the articles of impeachment be rescinded.

Mr. SUMNER. Mr. President——

Mr. JOHNSON. Is that debatable?

The CHIEF JUSTICE. It is not debatable.

Mr. SUMNER. I do not wish to debate; but I would like to have it amended so that it may operate from this day. For instance, leave to file opinions goes on for two days from the vote.

The CHIEF JUSTICE. The senator from Massachusetts can move an amendment, but it is not debatable. The question is on the adoption of the resolution.

Mr. SUMNER. I should like to have it read again, for I may have misunderstood it.

The chief clerk read as follows:

Resolved, That the resolution heretofore adopted as to the order of reading and voting upon the articles of impeachment be rescinded.

Mr. SUMNER. That is a different order from what I supposed.

Mr. JOHNSON. Mr. Chief Justice, I do not rise to debate it, but merely to ask the mover what will be the effect of the adoption of that order?

The CHIEF JUSTICE. Explanation implies debate. It is not in order.

Mr. TRUMBULL. Mr. President, I should like to hear the resolution read which is to be rescinded.

The CHIEF JUSTICE. The Secretary will read the order heretofore adopted by the Senate.

Mr. POMEROY. I think the proceedings of the last day should be read first; then we shall know what the order is that is to be rescinded, and we can proceed to vote intelligently. I move that we have the proceedings read.

The CHIEF JUSTICE. The Chief Justice thinks the first business in order is to notify the House of Representatives that the Senate is ready to receive them at its bar. After that has been done the course has been to read the journal of the proceedings, and then the regular business of the Senate will be in order. No objection having been made to entertaining the order proposed by the senator from Oregon, the Chief Justice submitted it to the Senate.

Mr. JOHNSON. I object.

Mr. EDMUNDS. I move that the House of Representatives be notified that the Senate is ready to receive them.

The motion was agreed to.

The CHIEF JUSTICE. The Sergeant-at-arms will notify the House of Representatives.

The Sergeant-at-arms presently appeared at the bar and announced the managers of impeachment on the part of the House of Representatives.

The CHIEF JUSTICE. The managers will take their seats within the bar.

The managers took the seats provided for them.

The members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, next appeared and were conducted to the seats provided for them.

The CHIEF JUSTICE. The Secretary will read the journal of the last day's proceedings.

The chief clerk read the journal of the proceedings of the Senate, sitting for the trial of the impeachment, of Saturday, the 16th instant.

Mr. JOHNSON. Mr. Chief Justice, there is an omission, I think, in the journal. It is not stated that Mr. Stanbery, who is one of the counsel for the

Digitized by Google

President, was present on the occasion of the proceedings just read. I move that the omission be supplied. We know he was present.

The CHIEF JUSTICE. That statement is made in the journal as it stands. There was an omission in the reading. The Secretary will now read the order submitted by the senator from Oregon.

The chief clerk read Mr. Williams's resolution, as follows:

Resolved, That the resolution heretofore adopted as to the order of reading and voting upon the articles of impeachment be rescinded.

Mr. BUCKALEW. Mr. President, if it requires unanimous consent to change the rule in the manner proposed, I object.

The CHIEF JUSTICE. The Chief Justice is under the impression that it changes the rule, and he will state the case to the Senate, in order that the Senate may correct him if he is wrong. The twenty-second rule of the Senate provides that—

On the final question, whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately.

That necessarily implies that they be taken in their order unless it is otherwise prescribed by the Senate. Subsequently the framing of a question to be addressed to the senators was left to the Chief Justice, and he stated the views which seemed to him proper to be observed. In the course of that statement he said that "he will direct the Secretary to read the articles successively, and after the reading of each article will put the question of guilty or not guilty to each senator, rising in his place, in the form used in the case of Judge Chase," and then stated the form.

After the statement was made—

Mr. SUMNER submitted the following order, which was considered by unanimous consent, and agreed to:

Ordered, That the question be put as proposed by the presiding officer of the Senate, and each senator shall rise in his place and answer guilty or not guilty, only.

That was the order under which the Senate was acting until, on the 16th of May, the Senate adopted the following order moved by the senator from Oregon, [Mr. Williams:]

Ordered, That the Chief Justice, in directing the Secretary to read the several articles of impeachment, shall direct him to read the eleventh article first, and the question shall then be taken on that article, and thereafter the other ten successively as they stand.

This order changing the rule was in order on the 16th of May, having been moved some days before. Subsequently, after the House had been notified that the Senate was ready to receive them, the senator from Vermont [Mr. Edmunds] moved—

That the Senate do now proceed to vote upon the articles according to the order of the Senate just adopted.

The Senate proceeded to vote upon the eleventh article, and after that adjourned until to-day. The present motion is to change the whole of these orders, for changing only the order adopted on the 16th will not reach the effect intended. It must change also the order adopted on the motion of the senator from Massachusetts, [Mr. Sumner,] and also, as the Chief Justice conceives, the rule. He is of opinion, therefore, that a single objection will take it over this day, but will submit the question directly to the Senate without undertaking to decide it, as it is a matter which relates especially to the present order of business. Senators, you who are of opinion that the motion of the senator from Oregon is now in order will say ay; contrary opinion, no. [Putting the question.] The noes appear to have it.

Mr. DRAKE called for a division.

Mr. HENDERSON called for the yeas and nays, and they were ordered; and being taken, resulted—yeas, 29; nays, 25; as follows:

YEAS—Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Cragin, Drake, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morton, Nye, Pomeroy,

Google

Ramsay, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Williams, Wilson, and Yates—29.

NAYS—Messrs. Anthony, Bayard, Buckalew, Corbett, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morrill of Vermont, Norton, Patterson of New Hampshire, Patterson of Tennessee, Saulsbury, Trumbull, Van Winkle, Vickers, and Willey—25.

The CHIEF JUSTICE. The Senate decides that the resolution of the senator from Oregon is now in order. The Secretary will read the resolution.

The chief clerk read as follows:

Resolved, That the resolution heretofore adopted as to the order of reading and voting upon the articles of impeachment be rescinded.

Mr. CONKLING. I offer the following as a substitute for the pending order.

The CHIEF JUSTICE. The Secretary will read the amendment of the senator from New York.

The chief clerk read as follows:

Strike out all after the word "Resolved," and insert:

That the Senate, sitting for the trial of Andrew Johnson, President of the United States, will now proceed, in manner prescribed by the rules in that behalf, to vote upon the remaining articles of impeachment.

Mr. TRUMBULL called for the yeas and nays on the amendment, and they were ordered; and being taken, resulted—yeas, 26; nays, 28; as follows:

YEAS—Messrs. Bayard, Buckalew, Cole, Conkling, Davis, Dixon, Doolittle, Ferry, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morgan, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Saulsbury Trumbull, Van Winkle, Vickers, and Willey—26.

NAYS—Messrs. Anthony, Cameron, Cattell, Chandler, Conness, Corbett, Cragin, Drake, Edmunds, Frelinghuysen, Harlan, Howard, Howe, Morrill of Maine, Nye, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Williams, Wilson, and Yates—28.

So the amendment was rejected.

The CHIEF JUSTICE. The question recurs on the resolution proposed by the senator from Oregon.

Mr. WILLIAMS. I suggest an amendment to the phraseology of that resolution so as to refer to the rules as well as the resolution heretofore adopted.

The CHIEF JUSTICE. The senator will reach his object by saying "the several orders heretofore adopted."

Mr. WILLIAMS. Very well; let that phraseology be adopted.

The CHIEF JUSTICE. The Secretary will read the resolution, as modified.

The chief clerk read as follows:

Resolved, That the several orders heretofore adopted as to the order of reading and voting upon the articles of impeachment be rescinded.

Mr. TRUMBULL. Mr. President, I wish to inquire whether it is in order to rescind an order partly executed. What would be the effect of it? It seems to me not to be in order to rescind an order which has been partly executed.

The CHIEF JUSTICE. If the senator from Illinois makes that question of order, the Chief Justice will submit it to the Senate.

Mr. TRUMBULL. I make that question, that you cannot rescind an order that is partly executed. We have voted under that order. It might be rescinded as to what remains unexecuted; but the effect of rescinding an order would be a reconsideration.

Mr. CONNESS. Mr. President, I object to discussion of this subject.

The CHIEF JUSTICE. No debate is in order.

Mr. CONNESS. I supposed the Senate had already decided that this resolution was in order.

Mr. DOOLITTLE. Mr. Chief Justice, whatever might have been the ruling on the order as it stood——

The CHIEF JUSTICE. No debate is in order.

Mr. DOOLITTLE. This proposition I object to as out of order. On its face it proposes to change the rules of the Senate.

Digitized by Google

Mr. THAYER. I call the senator to order.

The CHIEF JUSTICE. The senator cannot debate the question.

Mr. DOOLITTLE. I object to the proposition as out of order.

Mr. CONKLING. That has been done already.

The CHIEF JUSTICE. That has been done.

Mr. DOOLITTLE. If the Chief Justice will allow me to say, not in its present form.

Mr. SPRAGUE. The senator is out of order.

Mr. DOOLITTLE. I object that this resolution is out of order.

The CHIEF JUSTICE. The senator is out of order.

Mr. DOOLITTLE. I object to the resolution.

The CHIEF JUSTICE. The senator from Illinois [Mr. Trumbull] objects that the order proposed by the senator from Oregon [Mr. Williams] is not in order, because it rescinds an order which is already in process of execution.

Mr. TRUMBULL. Which has been already partly executed.

The CHIEF JUSTICE. And that question the Chief Justice will submit to the Senate as a question of order.

Mr. EDMUNDS. Mr. President, I move that the Senate withdraw for consultation on this question.

Several SENATORS. No, no.

The CHIEF JUSTICE. The senator from Vermont moves that the Senate do now withdraw for consultation.

The motion was not agreed to.

Mr. MORRILL, of Maine. Will the Chair entertain a motion at this time?

The CHIEF JUSTICE. The objection of the senator from Illinois is not yet disposed of.

Mr. TRUMBULL. Mr. President, I desire to put it upon two grounds: one that it is partly executed——

Mr. CONNESS. I object.

Mr. TRUMBULL. I take it that it is in order to state my question of order.

The CHIEF JUSTICE. The senator can state his question of order.

Mr. TRUMBULL. My objection is twofold: first, that it is out of order to undertake to rescind an order partly executed; and secondly, that it is a violation of the rule which requires one day's notice to change a rule, and it expressly now proposes to change a rule.

The CHIEF JUSTICE. Senators, you who are of opinion that the point of order made by the senator from Illinois should be sustained will say ay; those of the contrary opinion, no. [Putting the question.] The noes appear to have it.

Mr. TRUMBULL. I ask for the yeas and nays.

The yeas and nays were ordered.

The CHIEF JUSTICE. The senator from Illinois makes the point of order that the resolution moved by the senator from Oregon is not now in order for consideration, because it relates to an order partly executed, and because—Will the senator oblige the Chair by stating his other reason?

Mr. CONNESS. I object to two points of order at a time. One will be sufficient.

The CHIEF JUSTICE. Will the senator from Illinois be kind enough to state his other reason?

Mr. TRUMBULL. My other reason is that, as now amended, the resolution proposes to change a standing rule of the Senate, which cannot be done without a day's notice.

The CHIEF JUSTICE. Senators, you who are of opinion that the point of order should be sustained as stated will answer yea; those of the contrary opinion nay.

The chief clerk proceeded to call the roll, and having concluded the call—

Mr. CONKLING, (who had voted yea.) Mr. President, I rise to a question of order, if that be the proper form. I think I voted myself under a misapprehension, and I understand other senators have done so. Will the Chief Jus-

tice be kind enough to restate the question in the form in which it was put? I understand from other senators that the question propounded was in this form: those in favor of sustaining the point of order will vote yea. I had supposed that the question was put as before: those deeming the proposition in order will say yea; and I voted affirmatively, meaning to vote against the point raised by the senator from Illinois, but I am told that the effect of the record is to make me vote in favor of the point of order. I want to know what the form of the question was, if the Chair will be kind enough to state it.

The CHIEF JUSTICE. The Chief Justice stated the question in the form supposed by the senator from New York, that those who voted to sustain the point of order made by the senator from Illinois would say yea; those of the contrary opinion nay. If there be a misunderstanding the question will be again submitted to the Senate. ["No!" "No!"]

Mr. CONKLING. I beg to change my vote, if that is the form. I voted under an entire misapprehension. I vote nay.

The result was announced—yeas, 24; nays, 30; as follows:

YEAS—Messrs. Anthony, Bayard, Buckalew, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Morgan, Morrill of Vermont, Norton, Patterson of Tennessee, Saulsbury, Trumbull, Van Winkle, Vickers, and Willey—24.

NAYS—Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Frelinghuysen, Harlan, Howard, Howe, Morrill of Maine, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsay, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Williams, Wilson, and Yates—30.

So the point of order was not sustained.

Mr. MORRILL, of Maine. Mr. President, I rise to inquire whether the Chair will entertain a motion at the present time?

The CHIEF JUSTICE. Any motion to amend this resolution. The question now is on the resolution offered by the senator from Oregon. Any motion to amend that resolution is in order, or a motion to postpone it is in order.

Mr. MORRILL, of Maine. I move that the Senate sitting to try the impeachment of Andrew Johnson, President of the United States, do now adjourn to the 23d day of June next at 12 o'clock, and on that question I demand the yeas and nays.

The CHIEF JUSTICE. The Chief Justice has heretofore ruled that that motion was not in order, but he was not sustained by the Senate. He will now submit the question whether this motion is in order directly to the Senate. Senators, you who are of opinion that the motion of the senator from Maine, that the Senate do now adjourn until the 23d day of June——

Mr. CONNESS. Mr. President, I rise to inquire of the Chair whether a ruling made by the Senate upon a given point does not stand as the rule of the Senate until the Senate reverses it?

The CHIEF JUSTICE. Undoubtedly; but the Chief Justice cannot undertake to say how soon the Senate may reverse its rulings. Senators, you who are of opinion that the motion of the senator from Maine, that the Senate do now adjourn until the 23d day of June, is in order, will say ay; those of the contrary opinion, no. [Putting the question.] The ayes appear to have it.

Mr. HENDERSON called for the yeas and nays, and they were ordered; and being taken, resulted—yeas, 35; nays, 18; as follows:

YEAS—Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Willey, Williams, Wilson, and Yates—35.

NAYS—Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Henderson, Hendricks, Johnson, McCreery, Morgan, Norton, Patterson of Tennessee, Saulsbury, Trumbull, Van Winkle, and Vickers—18.

NOT VOTING—Mr. Grimes—1.

So the Senate decided the motion to be in order.

Digitized by Google

Mr. MORRILL, of Maine. I now renew my motion that the Senate, sitting for the trial of the impeachment of Andrew Johnson, President of the United States, adjourn to Tuesday, the 23d day of June, at 12 o'clock.

Mr. FERRY called for the yeas and nays, and they were ordered.

Mr. ROSS. Mr. President, I move to amend the motion by striking out "the 23d day of June" and inserting "the 1st day of September," and on that amendment I ask for the yeas and nays.

The yeas and nays were ordered; and being taken, resulted—yeas, 15; nays, 39; as follows:

YEAS—Messrs. Bayard, Davis, Dixon, Doolittle, Fessenden, Fowler, Henderson, Johnson, McCreery, Norton, Ross, Saulsbury, Trumbull, Van Winkle, and Vickers—15.

NAYS—Messrs. Anthony, Buckalew, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Grimes, Harlan, Hendricks, Howard, Howe, Morgan, Morrill of Maine, Mortill of Vermont, Morton, Nye, Patterson of New Hampshire, Patterson of Tennessee, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Willey, Williams, Wilson, and Yates—39.

So the amendment was rejected.

The CHIEF JUSTICE. The question recurs on the motion of the senator from Maine, that the Senate sitting as a court of impeachment do now adjourn until Tuesday, the 23d day of June, and upon that question the yeas and nays have been ordered.

The question being taken by yeas and nays, resulted—yeas, 27; nays, 27; as follows:

YEAS—Messrs. Anthony, Cameron, Cattell, Chandler, Conness, Corbett, Cragin, Drake, Harlan, Howard, Howe, Morrill of Maine, Nye, Pomeroy, Ramsey, Ross, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Willey, Williams, Wilson, and Yates—27.

NAYS—Messrs. Bayard, Buckalew, Cole, Conkling, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Henderson, Hendricks, Johnson, McCreery, Morgan, Morrill of Vermont, Morton, Norton, Patterson of New Hampshire, Patterson of Tennessee, Saulsbury, Trumbull, Van Winkle, and Vickers—27.

The CHIEF JUSTICE. Upon this question the yeas are 27 and the nays are 27. So the motion is not agreed to.

Mr. WILLIAMS. Mr. President, I move that the Senate proceed to vote upon the second article of impeachment.

The CHIEF JUSTICE. The senator from Oregon moves that the Senate do now proceed to vote upon the second article.

Mr. WILLIAMS. I withdraw the motion that I have just made until the other order is adopted. I was under the misapprehension that it had been adopted.

The CHIEF JUSTICE. The question recurs on the resolution already submitted by the senator from Oregon, which the clerk will again read.

The chief clerk read as follows:

Resolved, That the several orders heretofore adopted as to the order of reading and voting upon the articles of impeachment be rescinded.

The resolution was agreed to.

Mr. WILLIAMS. Mr. President, I now move that the Senate proceed to vote upon the second article of impeachment.

The CHIEF JUSTICE. The senator from Oregon moves that the Senate now proceed to vote upon the second article of impeachment.

Mr. TRUMBULL. Is that in order, I rise to inquire?

The CHIEF JUSTICE. There being now no order relating to the order in which the articles shall be taken, the Chief Justice thinks it is in order. Senators, you who agree to the motion proposed by the senator from Oregon, that the Senate do now proceed to vote upon the second article of impeachment, will say aye; those of the contrary opinion, no. [Putting the question.] The ayes appear to have it. The ayes have it, and the motion is agreed to.

The Chief Justice will again admonish strangers and citizens in the galleries of the necessity of observing perfect order and profound silence. The clerk will now read the second article of impeachment.

Digitized by Google

The chief clerk read as follows:

ARTICLE II.

That on the said 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, said Andrew Johnson, President of the United States, unmindful of the high duties of his office, of his oath of office, and in violation of the Constitution of the United States, and contrary to the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, without the advice and consent of the Senate of the United States, said Senate then and there being in session, and without authority of law, did, with intent to violate the Constitution of the United States, and the act aforesaid, issue and deliver to one Lorenzo Thomas a letter of authority in substance as follows, that is to say:

"EXECUTIVE MANSION,
"*Washington, D. C., February* 21, 1868.

"SIR: The Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War *ad interim*, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully, yours,

"ANDREW JOHNSON.

"Brevet Major General LORENZO THOMAS,
"*Adjutant General United States Army, Washington, D. C.*"

Then and there being no vacancy in said office of Secretary for the Department of War, whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

The name of each senator was called in alphabetical order by the chief clerk; and as he rose in his place the Chief Justice propounded the following question:

Mr. Senator ———, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor, as charged in this article of impeachment?

The call of the roll having been concluded,

The senators who voted guilty are—

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Willey, Williams, Wilson, and Yates—35.

The senators who voted not guilty are—

Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, and Vickers—19.

The CHIEF JUSTICE. Thirty-five senators have pronounced the respondent, Andrew Johnson, President of the United States, guilty; nineteen have pronounced him not guilty. Two-thirds not having pronounced him guilty, he stands acquitted upon this article.

Mr. WILLIAMS. Mr. President, I move that the Senate now proceed to vote upon the third article.

The motion was agreed to.

The CHIEF JUSTICE. The Secretary will read the third article.

The chief clerk read the third article of impeachment, as follows:

ARTICLE III.

That said Andrew Johnson, President of the United States, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did commit and was guilty of a high misdemeanor in office, in this, that without authority of law, while the Senate of the United States was then and there in session, he did appoint one Lorenzo Thomas to be Secretary for the Department of War *ad interim*, without the advice and consent of the Senate, and with intent to violate the Constitution of the United States, no vacancy having happened in said office of Secretary for the Department of War during the

Digitized by Google

recess of the Senate, and no vacancy existing in said office at the time, and which said appointment, so made by said Andrew Johnson, of said Lorenzo Thomas, is, in substance, as follows, that is to say:

"EXECUTIVE MANSION,
"WASHINGTON, D. C., *February* 21, 1868.

"SIR: The Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War *ad interim*, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully, yours,

"ANDREW JOHNSON.

"Brevet Major General LORENZO THOMAS,
"*Adjutant General United States Army, Washington, D. C.*"

The roll was called as before, and as each senator rose in his place the Chief Justice propounded this question:

Mr. Senator ———, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor, as charged in this article?

The result was as follows:

Those who voted guilty are—

Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Willey, Williams, Wilson, and Yates—35.

Those who voted not guilty are—

Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, and Vickers—19.

The CHIEF JUSTICE. Thirty-five senators have pronounced Andrew Johnson, President of the United States, guilty, as charged in this article; nineteen have pronounced him not guilty. Two-thirds not having pronounced him guilty, the President of the United States stands acquitted upon this article.

Mr. WILLIAMS. Mr. President, I move that the Senate, sitting as a court of impeachment, do now adjourn *sine die*.

Mr. BUCKALEW. I ask for the yeas and nays on that motion.

The yeas and nays were ordered and taken.

The roll was called, and the result was as follows:

YEAS—Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Van Winkle, Wade, Willey, Williams, Wilson, and Yates—34.

NAYS—Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fowler, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, and Vickers—16.

NOT VOTING—Messrs. Conness, Fessenden, Grimes, and Howe—4.

The CHIEF JUSTICE. Before announcing the vote, the Chief Justice will remind the Senate that the 22d rule provides that if, "upon any of the articles presented," the impeachment shall not "be sustained by the votes of two-thirds of the members present," a judgment of acquittal shall be entered.

Several SENATORS. We cannot hear.

The CHIEF JUSTICE. The Chief Justice begs leave to remind the Senate that the 22d rule provides that "if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered."

Mr. DRAKE. I suggest, Mr. President, that that was done when the President of the Senate declared the acquittal upon each article.

Digitized by Google

The CHIEF JUSTICE. That is not the judgment of the Senate; but if there be no objection, the judgment will be entered by the clerk.

Mr. HOWARD. Not at all.

Mr. SUMNER. Of course not.

Several SENATORS. There is no objection.

Mr. HOWARD. Let the vote on adjournment be announced.

Mr. JOHNSON. Judgment must be entered.

Mr. SUMNER. There seems to be a misunderstanding as to the entry which it is proposed to make in the journal.

The CHIEF JUSTICE. The clerk will enter, if there be no objection, a judgment according to the rules—a judgment of acquittal.

Mr. CONNESS. I simply desire to say to the Chair that the very rule which has been read implies a vote before such a judgment can be entered; and unless a vote be taken no such judgment can be entered under the rule.

The CHIEF JUSTICE. The Chief Justice spoke of those articles upon which the vote has been taken. The rule is express.

Mr. CONNESS. Certainly; judgment must be entered on them.

Mr. DRAKE. I would suggest to the Chair that in the case of Judge Peck the only entry of acquittal was the declaration by the presiding officer that he was acquitted.

The CHIEF JUSTICE. The Chief Justice simply follows the rules which have been ordained for their own government by the Senate. He does not follow a precedent; he follows the rule.

Mr. SUMNER. Mr. President, as I understand, the Chair has already, on each vote, made a declaration of acquittal, and that is of record.

The CHIEF JUSTICE. That, however, is not the judgment of the Senate contemplated by the rule; it is simply the result of the particular vote upon each article, and the rules provide that the judgment shall be entered.

Mr. CONNESS. There can be no objection to that.

The CHIEF JUSTICE. Upon the question of adjournment without day the yeas are 34 and the nays are 16. So the Senate, sitting as a court of impeachment for the trial of Andrew Johnson, upon articles of impeachment presented by the House of Representatives, stands adjourned without day.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

This book should be returned to the Library on or before the last date stamped below.

A fine of five cents a day is incurred by retaining it beyond the specified time.

Please return promptly.

NOV 11 '63 H

1 24463

APR 10 '64 H

211,014

CANCELLED

MAR 4 1974 H

FEB 16 1974

4405923

Digitized by Google

Widener Library
3 2044 090 079 740

Digitized by Google